CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 61.

MARY McCUNE, BY DANIEL DONAHUE, HER GUARDIAN *AD LITEM*, APPELLANT,

vs.

N. FRED ESSIG AND EMMA C. ESSIG, HIS WIFE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED JULY 18, 1905.

(19,419.)

(19,419.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 319.

MARY McCUNE, BY DANIEL DONAHUE, HER GUARDIAN *AD LITEM*, APPELLANT,

vs.

N. FRED ESSIG AND EMMA C. ESSIG, HIS WIFE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 28, 1904.

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a United States Circuit Court of Appeals for the Ninth Circuit.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Appellant,
vs.
N. FRED ESSIG and EMMA C. ESSIG, His Wife, Appellees. } No. 924.

Transcript of Record.

Upon appeal from the United States circuit court for the district of Washington, eastern division.

Filed Dec. 30 1902

1 In the Circuit Court of the United States for the District of Washington, Eastern Division.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Complainant and Appellant,
vs.
N. FRED ESSIG and EMMA C. ESSIG, His Wife, Defendants and Respondents.

Citation on Appeal (Original).

UNITED STATES OF AMERICA, ss:

To N. Fred Essig and Emma C. Essig, his wife, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals, for the ninth circuit, to be holden at the city of San Francisco, in the State of California, on the first Monday of February, one thousand nine hundred three, pursuant to an appeal, filed in the clerk's office of the circuit court of the United States for the district of Washington, eastern division, wherein Mary McCune, by Daniel Donahue, her guardian *ad litem*, is appellant, and N. Fred Essig, and Emma C. Essig, his wife, are respondents, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

2 Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 17th day of November, in the year of our Lord one thousand nine hundred and two.

C. H. HANFORD,
District Judge.

Attest:
[SEAL.]
A. REEVES AYRES, *Clerk*,
By FRANK C. NASH, *Deputy*.

Due service of the within citation on appeal by a true copy thereof accepted this 17th day of November, 1902.

GRAVES & GRAVES,
Solicitors for Respondents.

(Endorsed:) No. 954. In the circuit court of the United States for the district of Washington, eastern division. Mary McCune, by Daniel Donahue, her guardian *ad litem*, appellant, *vs.* N. Fred Essig and Emma C. Essig, his wife, respondents. Citation on appeal. Filed in the United States circuit court, district of Washington. Nov. 17, 1902. A. Reeves Ayres, clerk. By Frank C. Nash, deputy.

(Endorsed:) No. 924. United States circuit court of appeals for the ninth circuit. Mary McCune etc., *vs.* N. Fred Essig, *et ux.* Original citation on appeal. Filed December 12th, 1902. F. D. Monckton, clerk.

3 In the Circuit Court of the United States for the District of Washington, Eastern Division.

MARY McCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Plaintiff,
vs.
N. FRED ESSIG and EMMA C. ESSIG, His Wife, Defendants.

Caption.

September Term, 1902.

Be it remembered, that on the 2d day of September, 1902, there was duly filed in said circuit court of the United States for the district of Washington, eastern division, a transcript from the superior court of the State of Washington, in and for the county of Lincoln, in the words and figures as follows, to wit:

In the Superior Court of the State of Washington in and for the County of Lincoln.

Petition for Appointment of Guardian ad Litem.

To the Honorable C. H. Neal, judge of the above-named court:

Comes now Daniel Donahue, your petitioner herein, and respectfully shows to your honorable court that Mary McCune is a stepdaughter of your petitioner, and that she is a minor under the age of eighteen years.

4 That she is the owner and entitled to the possession of the undivided one-half interest of the northwest quarter section 6, township 25 north, range 38, E. W. M.

That N. Fred Essig is now, and has been ever since the year 1892, in possession of said real estate, claiming to be the owner thereof.

That for the purpose of obtaining the possession of said real estate, quieting the title thereof in said Mary McCune and compelling an accounting for the rents and profits thereof from said N. Fred Essig, it is necessary to commence an action in the above-entitled court.

Wherefore, the petitioner prays that he may be appointed guardian *ad litem* for said Mary McCune for the purpose of instituting and prosecuting said action for her.

MERRITT & MERRITT,
Attorneys for Petitioner.

STATE OF WASHINGTON, } ss:
County of Spokane, }

J. W. Merritt, being first duly sworn, upon his oath says: That he is one of the attorneys for the above-named petitioner; that he makes the affidavit for and instead of said petitioner, for the reason that said petitioner is not now present in said county to make said affidavit; that he has read the above and foregoing petition; knows the contents thereof and that the same is true as he verily believes.

J. W. MERRITT.

5 Subscribed and sworn to before me this 5th day of April, 1902.

____ ____,
Notary Public for the State of Washington,
Residing at Spokane.

Filed April 26, 1902.

W. H. YARWOOD, *Clerk.*

In the Superior Court of the State of Washington in and for the County of Lincoln.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, }
vs.
N. FRED ESSIG ET UX. }

Order Appointing Guardian ad Litem.

This matter coming on to be heard upon the petition of Daniel Donahue to be appointed guardian *ad litem* to institute and prosecute an action for Mary McCune, a minor, the court having read said petition and being sufficiently advised in the premises, finds that said Mary McCune is a minor, under the age of eighteen years; that she is entitled to have a guardian *ad litem* appointed to institute and prosecute said action for her, and that said Daniel Donahue is

a suitable person to be appointed as such guardian *ad litem;* it is therefore ordered and adjudged that said Daniel Donahue be, and he hereby is, appointed guardian *ad litem* for said Mary McCune, and authorized to institute and prosecute for her as such guardian
ad litem, an action against N. Fred Essig for the purpose of
6 obtaining possession and quieting the title to the land described in said petition, and to compel an accounting for the rents and profits of said lands.

Done in open court this 24th day of April, 1902.

C. H. NEAL, *Judge.*

Filed April 26, 1902.

W. H. YARWOOD, *Clerk.*

In the Superior Court of the State of Washington in and for the County of Lincoln.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Plaintiff,
vs.
N. FRED ESSIG and —— ESSIG, His Wife, Defendants.

Summons.

The State of Washington to the above-named defendants, N. Fred Essig and —— Essig, his wife:

You and each of you are hereby summoned to appear within twenty (20) days after the service of this summons upon you, exclusive of the day of service thereof, and defend the above-entitled action, and answer the complaint herein, and serve a copy of your answer upon the undersigned attorneys for plaintiff at their address given below, and in the event of your failure so to do, judgment will be taken against you, as prayed for and demanded
7 in the complaint herein, a copy of which is hereto attached and herewith served upon you.

MERRITT & MERRITT,
Attorneys for Plaintiff.

Suit 421, the Rookery, Spokane, Wash.

Filed May 6, 1902.

W. H. YARWOOD, *Clerk.*

In the Superior Court of the State of Washington in and for the County of Lincoln.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Plaintiff,
vs.
N. FRED ESSIG and —— ESSIG, His Wife, Defendants.

Stipulation as to Filing Amended Complaint.

It is stipulated between the plaintiff, appearing by Merritt & Merritt, and the defendants appearing by Graves and Graves, as follows:

I.

Plaintiff desires to amend his complaint, and it is agreed that he may do so at any time within thirty days hereafter, and that defendants shall have twenty days thereafter in which to answer, demur or otherwise plead to the amended complaint.

8

II.

In view of plaintiff's wish to amend, defendants will not be required to appear in this cause until after amendment.

Dated March 10th, 1902.

MERRITT & MERRITT,
Attorneys for Plaintiff.
GRAVES & GRAVES,
Attorneys for Defendants.

Filed June 18, 1902.

W. H. YARWOOD, *Clerk.*

In the Superior Court of the State of Washington in and for the County of Lincoln.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Plaintiff,
vs.
N. FRED ESSIG and —— ESSIG, His Wife, Defendants.

Amended Complaint.

By stipulation and with the consent of defendants herein, to file an amended complaint, plaintiff for an amended complaint herein, complains of the defendant and avers:

I.

That by an order of the above-named court heretofore made and filed herein, the above-named Daniel Donahue has been appointed guardian *ad litem* for the above-named Mary McCune, and authorized to commence and prosecute this action on behalf of said Mary McCune.

II.

That said Mary McCune is a resident of the county of Lincoln, in the State of Washington, and under the age of eighteen years.

III.

That said Mary McCune is the daughter and only child of William McCune and Sarah Donahue (*née* McCune).

IV.

That prior to the 4th day of April, 1884, and while said William McCune and Sarah Donahue (*née* McCune) were living together and were husband and wife, said William McCune and his wife entered upon and took possession of the following described real estate, situate in the county of Lincoln, State of Washington, to wit:

The south half of the northeast quarter (N. E. ¼) and lots numbered one (1) and two (2) of section six (6), township twenty-five (25), N. R. thirty-eight (38), E. W. M., which said lands were at the time of said entry thereon a part of the public lands of the United States, and open for settlement and homestead entry under and by virtue of the laws of the United States.

V.

That on the 4th day of April, 1884, said William McCune filed in the United States land office, at Spokane Falls, in the State of Washington, his notice of entry and possession of said lands and his application to take said lands as a homestead, under and in compliance with the homestead laws of the United States of America.

VI.

That subsequent to said 4th day of April, 1884, to wit, on the —— day of ——, 1884, said William McCune died intestate, and left surviving him as his only heirs, his said wife, Sarah Donahue (*née* McCune) and the plaintiff herein, Mary McCune.

VII.

That at the time said William McCune entered upon and took possession of said lands, and all times thereafter, and at the time of his said death, William McCune and Sarah Donahue (*née* McCune) were residing together upon said lands and were husband and wife.

VIII.

That subsequent to the death of said William McCune, said Sarah Donahue (*née* McCune), and her said daughter, Mary McCune, continued to reside upon said lands and to hold the possession thereof, until the 17th day of December, 1889.

IX.

That on the said 17th day of December, 1889, by reason of the application to take said lands as a homestead filed with said United States land office by said William McCune, as hereby alleged, said Sarah Donahue (*née* McCune) made final proof of the continued residence of her said husband and herself upon said lands until the time of the death of her said husband, and the continued occupation and possession of said lands by herself as the widow of said William McCune, subsequent to the death of said William McCune and until the said 17th day of December, 1889, and received a final certificate from the proper officer of the United States of America.

11

X.

That in pursuance of said entry and the filing of said application by said William McCune as hereinbefore alleged and of the continued possession of said William McCune, and said Sarah Donahue (*née* McCune), as the widow of said William McCune, subsequent to the death of said William McCune, and of the final proof made by said widow as hereinbefore alleged, and under the laws of the United States of America, giving to the said widow and the heirs of said William McCune the right to make said final proof and to obtain patent therefor, a patent was issued for said lands to said Sarah Donahue, formerly widow of William McCune, deceased, on the 6th day of March, 1891, a copy of which patent is hereto attached marked Exhibit "A" and made a part hereof.

XI.

That about the year 1892, said Sarah Donahue (*née* McCune) sold said lands to defendants and made and executed and delivered to defendants a deed of conveyance therefor, and defendants thereupon, in said year 1892, took possession of said lands, and have ever since kept and retained said possession, and have kept and retained the rents and profits of said lands, and appropriated said rents and profits to their own use and benefit.

12

XII.

That the rents and profits from said lands are and have been of the value of $300.00 per year from and ever since the time defendants so took possession of said lands.

XIII.

That said real estate is of the value of $6,400.

XIV.

That plaintiff is the owner of the undivided one-half of said real estate, and is entitled to the undivided one-half of the rents and profits of said real estate from the time said defendants so took possession of said real estate.

XV.

That defendants, by reason of the matters and things hereinbefore alleged, claim to be the owners of said real estate, which said claim is unfounded without right, and is a cloud upon plaintiff's title in and to said real estate.

XVI.

That said real estate cannot well be divided between the parties hereto without loss to the parties, and in order to make partition thereof, it will be necessary that said real estate be sold and the proceeds arising from said sale be divided between said parties.

XVII.

That in order to get partition of said real estate, it has been necessary for plaintiff to employ attorneys to represent her in said action for partition and plaintiff has employed Merritt & Mer-
13 ritt, as her attorneys in said action, and a reasonable fee for their services therein is the sum of $250.00.

Wherefore, plaint-ff prays for judgments against defendants:

I.

That plaintiff be adjudged and decreed the owner of the undivided one-half (½) of northwest quarter (N. W. ¼) of section six (6), township twenty-five (25) north, range thirty-eight (38), E. W. M., and that she have her title thereto quieted in her.

II.

That plaintiff have and recover of and from the defendants the undivided one-half of the rents and profits of said real estate since the time said defendants took possession thereof, together with interest at the rate of six per cent. per annum.

III.

That said real estate be partitioned and divided between the plaintiff and the defendants, setting off to plaintiff the undivided one-half thereof, and in the event that said real estate cannot be so

partitioned and divided without injury thereto and without loss to the parties, that said real estate be by the court ordered to be sold and the proceeds of said sale to be partitioned and divided between said parties and that the court appoint a commissioner to make said sale.

IV.

That the court tax as costs herein the sum of two hundred and fifty dollars ($250.00) as and for attorneys' fees for plaintiff's attorneys in this action.

14

V.

That plaintiff have and recover of and from the defendants her costs and disbursements herein, and that plaintiff have all other and proper relief that she is in law and equity entitled to have.

MERRITT & MERRITT,
Attorneys for Plaintiffs.

STATE OF WASHINGTON, }
County of Lincoln, } *ss:*

Daniel Donahue, being first duly sworn, upon his oath says: That he is the plaintiff on behalf of the above named Mary McCune in the above entitled action, that he has read the above and foregoing complaint; knows the contents thereof and that the same is true, as he verily believes.

DANIEL DONAHUE.

Subscribed and sworn to before me this 30th day of May A. D. 1902.

J. E. HOWARD,
Notary Public for the State of Washington,
Residing at Spokane, Washington.

EXHIBIT "A."

Homestead Certificate No. 2656—*Application* 3922.

The United States of America to all to whom these presents shall come, Greeting:

Whereas there has been deposited in the General Land
15 Office of the United States a certificate of the register of the land office at Spokane Falls, Washington, it appears that, pursuant to the act of Congress approved 20th May, 1862, "To secure homesteads to actual settlers on the public domain," and the acts supplemental thereto, the claim of Sarah Donahue, formerly the widow of William McCune, deceased, has been established and duly consummated, in conformity to law, for the south half of the north-

east quarter and the lots numbered one and two of section six, in township twenty-five north of range thirty-eight of Willamette meridian in Washington, containing one hundred and sixty-three and eighty-four hundredths of an acre, according to the official plat of the survey of the said land, returned to the General Land Office by the surveyor general.

Now know ye, that there is, therefore, granted by the United States unto the said Sarah Donahue, the tract of land above described, to have and to hold the said tract of land, with the appurtenances thereof, unto the said Sarah Donahue and to her heirs and assigns forever, subject to any vested and accrued water rights for mining, manufacturing, or other purpose, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

In testimony whereof I, Benjamin Harrison, President of the
16 United States of America, have cause these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the sixth day of March, in the year of our Lord, one thousand eight hundred and ninety-one, and of the Independence of the United States, the one hundred and fifteenth.

By the President:

BENJAMIN HARRISON,
By ELLEN MACFARLIN,
Assistant Secretary.

[SEAL.]

J. R. CONWELL,
Recorder of the General Land Office ad Interim.

Recorded vol. 5, page 499.

Filed June 18, 1902.

W. H. YARWOOD, *Clerk.*

In the Superior Court of the State of Washington in and for the County of Lincoln.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Plaintiff,
vs.
N. FRED ESSIG and EMMA C. ESSIG, His Wife, Defendants. } No. —.

Demurrer.

Comes now the defendants and demur to the amended complaint of plaintiff herein, upon the following grounds:

1. Said complaint does not state a cause of action.

17 2. It appears from said complaint that William McCune died after making his homestead entry and before residing thereon five years, and before complying with the other conditions of the homestead laws of the United States, and before making final proof thereof, and receiving a final certificate therefor. That thereafter, his widow, Sarah McCune, completed the term of said residence, and made final proof, and received a final certificate, and thereafter, and pursuant thereto, a patent for said land from the United States. That under the homestead laws of the United States she was entitled to receive said land and patent for her own right and for her own interest, and the plaintiff herein was not entitled to any interest in said land or in said patent, and as a fact did not receive any.

3. That under the homestead laws of the United States, on the death of an entryman before final proof, the widow is entitled to prove up in her own right and to receive a patent to the said land to the exclusion of the child or children of the homesteader; and therefore plaintiff was entitled to no interest in said land or in said patent.

4. It appears from said complaint that plaintiff has no interest in the land mentioned and described therein, and had no interest at the time of the conveyance to defendants as alleged in the complaint:

Wherefore, defendants pray that this cause may be dismissed, and that they have judgment for their costs.

GRAVES & GRAVES,
Attorneys for Defendants.

Filed June 6, 1902.

W. H. YARWOOD, *Clerk.*

18 In the Superior Court of the State of Washington in and for the County of Lincoln.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Plaintiff,
vs.
N. FRED ESSIG and EMMA C. ESSIG, His Wife, Defendants.

Petition for Removal of Cause.

To the honorable judge of the superior court of the State of Washington in and for the county of Lincoln:

Your petitioners, the above-named defendants, respectfully show that the matter and amount in dispute in the above-entitled cause exceeds, exclusive of interests and costs, the sum or value of two thousand dollars, as appears by the original and amended complaint herein.

That your said petitioners were at the time of bringing this suit, and still are, citizens of the State of Washington, and that the plaintiff was then, and still is, a citizen of the State of Washington.

That said suit is of a civil nature seeking to establish title in the plaintiff for an undivided one-half interest in the northwest quarter (N. W. ¼) of section six (6), township twenty-five (25) north,
19 range thirty, E. W. M. 2, and for an accounting of the rents and profits alleged to have been received therefrom by defendants, and for a partition of said real estate between the plaintiff and the defendants, and for general relief.

That said suit is one arising under the laws of the United States, in this, to wit; that by the amended complaint plaintiff claims title to the one-half interest in said land through her deceased father, William McCune. That said William McCune, on the 4th day of April, 1884, while he and his then wife, Sarah McCune, were living together as husband and wife, entered said described realty under the homestead laws of the United States.

That on the 4th day of April after said entry, said McCune filed in the United States land office at Spokane Falls his notice of entry and possession, and his application to take said lands as a homestead under and in compliance with the homestead laws of the United States.

That thereafter, and in the same year, he died intestate, leaving surviving him his said wife and the infant plaintiff herein, Mary McCune, and no other children or heirs. That thereafter, and on the 17th day of December, 1889, by reason of the application for a homestead filed by said McCune in lifetime, and by reason of her residence after his death until that date, Sarah McCune, his wife, made final proof and received a final certificate for said land. And that thereafter and in pursuance thereof, a patent was issued to her

for said land. That thereafter, and for a valuable consideration, she sold and conveyed said land to defendants. That by reason
20 of said facts, the plaintiff herein as the child of said William McCune, deceased, became entitled to and is the owner of an undivided one-half interest in said realty.

This cause, therefore, involves the construction of sections 2291 and 2292 of the Revised Statutes of the United States and of all the statutes of the United States relating to homestead entries and to patents therefor, and all of said facts appear upon the face of the amended complaint, but did not appear upon the face of the original complaint.

That service was had upon the original complaint on the 29th day of April, 1902. That thereafter, and on the 10th day of May, 1902, a stipulation was entered into between the plaintiff, by her attorneys, Merritt & Merrit, and the defendants, by their attorneys, Graves and Graves, giving plaintiff leave to amend the complaint within thirty days from that date and defendants' right to plead thereto by answer, demurrer or other pleadings within twenty days after its amendment.

That thereafter, and on the 30th day of May, 1902, plaintiff served upon defendants' attorneys said amended complaint, and thereafter, and on June 5th, 1902, defendants served upon plaintiff's attorneys a demurrer to said amended complaint, and likewise this petition and a copy of the bond for removal.

Your petitioners offer herewith a bond with good and sufficient surety, that they will enter in the circuit court of the United States for the district of Washington, eastern division thereof, on the first day of its next session, a copy of the record in this suit, and that they will pay all costs that may be awarded by said circuit
21 court if said court shall hold that this suit was wrongfully and improperly removed thereto.

And your petitioners pray this honorable court to proceed no further in this suit, except to make an order for the removal of this cause to said circuit court, and to accept said bond and surety, and to cause the record herein to be removed into said court; and they will ever pray.

GRAVES & GRAVES,
Attorneys for Petitioners and Defendants.

STATE OF WASHINGTON, } ss.
County of Spokane, }

Frank H. Graves, being first duly sworn, on his oath deposes and says: That he is a member of the firm of Graves & Graves, attorneys for the petitioners in the above-entitled cause; he has read the foregoing petition, knows the contents thereof, and that the statements and allegations therein are true as he verily believes.

FRANK H. GRAVES.

Subscribed and sworn to before me this 5th day of June, 1902.

A. J. LAUGHON,
Notary Public in and for the State of Washington,
Residing at Spokane, in said State.

Filed, June 6th, 1902.

W. H. YARWOOD, *Clerk.*

22 In the Superior Court of the State of Washington in and for the County of Lincoln.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Plaintiff,
vs.
N. FRED. ESSIG and EMMA C. ESSIG, His Wife, Defendants.

Bond on Removal.

Know all men by these presents that N. Fred Essig and Emma C. Essig, his wife, as principal, and G. G. Essig, as surety, are held and firmly bound unto Mary McCune and to Daniel Donahue, her guardian *ad litem*, in the penal sum of two hundred dollars, for the payment whereof, well and truly to be made we bind ourselves, our heirs and assigns jointly and severally by these presents. Yet upon these conditions: The said principals having petitioned the superior court of Lincoln county, State of Washington, for the removal of a certain cause therein pending, wherein the said Mary McCune, by Daniel Donahue, her guardian *ad litem*, is plaintiff, and the above-named principals are defendants, to the circuit court of the United States in and for the district of Washington, eastern division thereof, now if the said principals shall enter in the said court on the first day of its next session a copy of the record in said suit, and
23 shall well and truly pay all costs that may be awarded by said court, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and effect.

Witness our hands and seals this 5th day of June, 1902.

N. FRED ESSIG, [SEAL.]
By F. H. GRAVES. [L. S.]
EMMA C. ESSIG, [L. S.]
By F. H. GRAVES. [L. S.]
G. G. ESSIG. [L. S.]

Filed June 6th, 1902.

W. H. YARWOOD, *Clerk.*

STATE OF WASHINGTON, } ss:
County of Lincoln, }

I, W. H. Yarwood, clerk of the superior court, in and for said county and State, do hereby certify that the foregoing are true and

correct copies of the petition for guardian, order appointing guardian, summons and complaint, stipulation, amended complaint and exhibit, demurrer to amended complaint, petition for change of venue, and bond in the foregoing cause, as the same appears on file in my office. And that they are all the papers that have been filed in said cause.

In witness whereof, I hereunto set my hand and the seal of said court affixed this 30th day of August, 1902.

W. H. YARWOOD, *Clerk.*

[Seal of the Superior Court of Lincoln County, Washington.]

24 (Endorsed:) Transcript superior court, Lincoln county. Filed in the United States circuit court, district of Washington, September 2, 1902. A. Reeves ——, clerk. By Frank C. Nash, deputy.

And afterwards, to wit, on the 2nd day of September, 1902, there was duly filed in said court, in said case, a motion to remand, in the words and figures following to wit:

In the Circuit Court of the United States for the District of Washington, Eastern Division.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Plaintiff,
vs.
N. FRED ESSIG and EMMA C. ESSIG, His Wife, Defendants.

Motion to Remand.

Plaintiff moves the court to remand the above-entitled cause to the superior court of the State of Washington, in and for the county of Lincoln, for the following reasons, to wit:

First. That the petition to remove said cause from said
25 State court does not contain facts sufficient to warrant a removal, nor to warrant this court in retaining jurisdiction of said cause.

Second. That there is no question, dispute or controversy as to any right in this cause which depends upon or involves the construction of any law or treaty of the United States.

Third. That the only question or controversy involved in this cause, is under and must be determined by the laws of the State of Washington.

MERRITT & MERRITT,
Attorneys for Plaintiff.

Due service of the within motion by copy thereof, accepted this 22d day of August, 1902.

GRAVES & GRAVES,
Attorneys for Defendants.

(Endorsed:) Motion to remand. Filed in United States circuit court, district of Washington. Sept. 2, 1902. A. Reeves Ayres, clerk. By Frank C. Nash, deputy.

26 And afterwards, to wit, on the 29th day of September, 1902, there was duly filed in said court, in said case, an order denying motion to remand, in the words and figures following to wit:

In the Circuit Court of the United States for the District of Washington, Eastern Division.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Plaintiff,
vs.
N. FRED ESSIG and EMMA C. ESSIG, His Wife, Defendants.

Order Denying Motion to Remand.

Ordered that motion of plaintiff to remand this cause is denied. Plaintiff excepts and exception allowed.

C. H. HANFORD, *Judge.*

(Endorsed:) Order denying motion to remand. Filed in United States circuit court, district of Washington, Septembed 29th, 1902. A. Reeves Ayres, clerk. By Frank C. Nash, deputy.

27 And afterwards, to wit, on the 15th day of October, 1902, there was duly filed in said court, in said case, an order allowing defendants to withdraw demurrer filed in State court, and for leave to file an original demurrer in this court, in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Washington, Eastern Division.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Plaintiff,
vs.
N. FRED ESSIG and EMMA C. ESSIG, His Wife, Defendants.

Order Allowing Withdrawal of Demurrer, etc.

On motion of the defendants for leave to withdraw the demurrer filed in the State court, and for leave to file an original demurrer in this court, supported by certificate of counsel and affidavit of defendant, as required by the equity rules, it is ordered that leave be granted.

It is further ordered that, the cause having heretofore been argued upon the demurrer filed in the State court, be submitted on the demurrer, leave to file which is hereby given, without further argument.

Dated this 14th day of October, 1902.

C. H. HANFORD, *Judge.*

28 (Endorsed:) Filed in United States circuit court, district — Washington, October 15, 1902. A. Reeves Ayres, clerk. By Frank C. Nash, deputy.

And afterwards, to wit, on the 15th day of October, 1902, there was duly filed in said court, in said case, an original demurrer to plaintiff's amended complaint, in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Washington, Eastern Division, Sitting in Equity.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Plaintiff,
vs.
N. FRED ESSIG and EMMA C. ESSIG, His Wife, Defendants.

Demurrer to Amended Complaint.

Come now defendants and demur to the amended bill of complaint of plaintiff herein, upon the following grounds:

1. Said bill contains no matter of equity whereon this court can ground a decree or give complainants any relief as against these defendants.

2. It appears from said complaint that William McCune died after making his homestead entry and before residing thereon five
29 years, and before complying with the other conditions of the homestead laws of the United States, and before making final proof thereof, and receiving a final certificate therefor. That thereafter his widow, Sarah McCune, completed the term of said residence, and made final proof, and received a final certificate, and thereafter, and pursuant thereto, a patent of said land from the United States. That under the homestead laws of the United States she was entitled to receive said land and patent for her own right and for her own interest, and the plaintiff herein was not entitled to any interest in said land or in said patent, and as a fact did not receive any.

3. That under the homestead laws of the United States, on the death of an entryman before final proof, the widow is entitled to prove up in her own right and to receive a patent to the said land to the exclusion of the child or children of the homesteader, and

therefore plaintiff was entitled to no interest in said land or in said patent.

4. It appears from said complaint that plaintiff has no interest in the land mentioned and described therein, and had no interest at the time of the conveyance to defendants as alleged in the complaint.

Wherefore, these defendants pray judgment of the court whether they shall make answer to said bill otherwise than as aforesaid. And they pray to be hence dismissed with their costs and charges in this behalf sustained.

GRAVES & GRAVES,
Solicitors for Defendants.

30 I hereby certify, as counsel for defendants in the foregoing demurrer, that in my opinion the same is well founded in point of law and proper to be filed.

F. H. GRAVES,
Solicitor for Defendants.

STATE OF WASHINGTON, } ss:
County of Spokane, }

N. Fred Essig makes oath that the foregoing demurrer is not interposed for delay of the cause in which it is filed.

N. FRED ESSIG.

Subscribed and sworn to before me this 15th day of October, 1902.

[NOTARIAL SEAL.] A. J. LAUGHON,
Notary Public in and for the State of Washington,
Residing at Spokane, said State.

(Endorsed:) Filed in United States circuit court, district — Washington. October 15, 1902. A. Reeves Ayres, clerk. By Frank C. Nash, deputy.

31 And afterwards, to wit, on the 17th day of November, 1902, there was duly filed in said court, in said case, a decree, in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Washington, Eastern Division.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Plaintiff,
vs.
N. FRED ESSIG and EMMA C. ESSIG, His Wife, Defendants.

Decree.

This cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed, as follows, viz:

That the demurrer of defendants to the bill of complaint of plaintiff be, and the same hereby is, sustained, and plaintiff electing not to plead further, it is ordered and decreed that plaintiff has no right, title or interest to or in the land described in the bill of complaint, to wit: an undivided one-half interest in the northwest quarter (N. W. ¼) of section 6, township twenty-five (25), north, range
32 thirty, E. W. M., and that the bill of complaint be, and the same hereby is, dismissed and defendants have and recover their costs in this behalf sustained.

Dated this 17th day of November, 1902.

C. H. HANFORD, *Judge.*

(Endorsed:) Decree. Filed in United States circuit court, district — Washington, November 17th, 1902. A. Reeves Ayres, clerk. By Frank C. Nash, deputy.

And afterwards, to wit, on the 17th day of November, 1902, there was duly filed in said court, in said case, an appeal and allowance, in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Washington, Eastern Division.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Complainant and Appellant,
vs.
N. FRED ESSIG and EMMA C. ESSIG, His Wife, Defendants and Respondents.

Petition for Appeal and Order Allowing Same.

The above-named complainant conceiving herself aggrieved
33 by the order heretofore entered on this 17th day of November, 1902, in the above-entitled cause, doth hereby appeal from said order to the United States circuit court of appeals for the ninth circuit, and prays that her appeal may be allowed and that a transcript of the record and proceedings and papers on which said order was made, duly authenticated, may be sent to the said United States circuit court of appeals for the ninth circuit.

MERRITT & MERRITT,
Solicitors for Complain-t and Appellant.

It is hereby ordered that said appeal be allowed as prayed.

C. H. HANFORD, *Judge.*

(Endorsed:) Appeal and allowance. Filed in United States circuit court, district — Washington, November 17th, 1902. A. Reeves Ayres, clerk. By Frank C. Nash, deputy.

34 And afterwards, to wit, on the 17th day of November, 1902, there was duly filed in said court, in said case, plaintiff's assignment of errors, in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Washington, Eastern Division.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Complainant,
vs.
N. FRED ESSIG and EMMA C. ESSIG, His Wife, Defendants.

Assignment of Errors.

Now comes the above-named complainant, Mary McCune, by Daniel Donahue, her guardian *ad litem*, and says that in the record and proceedings in the above-entitled cause, there is manifest error as follows:

I.

That the circuit court of the United States for the district of Washington, eastern division, erred in denying complainant's motion to remand said cause to the superior court of the State of Washington, in and for the county of Lincoln.

II.

35 That said court failed and declined to hold that the determination of this action did not involve the construction of the Constitution or any treaty or law of the United States.

III.

The said court failed and declined to hold that said controversy and action was to be determined under and by the laws of the State of Washington.

IV.

The said court failed and declined to hold that the United States Supreme Court had held and decided that upon the issuance of a patent by said United States that such patent relates back and takes effect as of the time when the title was initiated.

V.

That said court failed and declined to hold that whenever according to the laws of the United States, the title to real estate shall have passed, and that the United States is not a party and that the validity of the patent is not attacked, then that property, like all other

property within the State, is subject to State legislation, provided, however, that such legislation is consistent with the admission that the title passed and vested, according to the laws of the United States.

VI.

That said court failed and declined to hold that it appeared from said bill that said complainant has such an interest in and to the lands described in said bill as entitles her to the relief prayed for in said bill or any relief.

36

VII.

The said court refused to grant the relief prayed or any relief.

VIII.

The said court held that there was no equity in said bill.

IX.

The said court erred in entering the order sustaining the demurrer to said bill.

X.

The said court erred in entering the order herein dismissing said bill.

Wherefore, said complainant prays that the order of said United States circuit court for the district of Washington, eastern division, be reversed and the said decree be vacated and that said court be directed to remand said cause to the superior court of the State of Washington, in and for the county of Lincoln, from whence it came, or that said court be directed to decree as prayed for in said bill.

MERRITT & MERRITT,
Solicitors for Complainant.

Service of the within assignment of errors, by a copy thereof made upon and accepted by the defendants, this 17th day of November, 1902.

GRAVES & GRAVES,
Solicitors for Defendants.

(Endorsed:) Assignment of errors. Filed in United States circuit court, district — Washington, November 17th, 1902. A. Reeves Ayres, clerk. By Frank C. Nash, deputy.

37 And afterwards, to wit, on the 17th day of November, 1902, there was duly filed in said court, in said case, a bond on appeal, in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Washington, Eastern Division.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Complainant and Appellant,
vs.
N. FRED ESSIG and EMMA C. ESSIG, His Wife, Defendants and Respondents.

Bond on Appeal.

Know all men by these presents, that Mary McCune, by Daniel Donahue, her guardian *ad litem*, as principal, and Price Frint and P. W. Lamona, as sureties, are held and firmly bound unto N. Fred Essig and Emma C. Essig, his wife, above named, in the sum of five hundred dollars, to be paid to the said N. Fred Essig and Emma C. Essig, his wife, their heirs, executors, administrators or assigns, for the payment of which, well and truly to be made, we bind ourselves and each of us jointly and severally, firmly by these presents.

38 Sealed with our seals, and dated this 17th day of November, in the year of our Lord one thousand nine hundred and two.

The condition of the above bond is such that whereas the above-named plaintiff, Mary McCune, by Daniel Donahue, her guardian *ad litem*, has prosecuted an appeal from the United States circuit court, for the district of Washington, eastern division, to the United States circuit court of appeals, for the ninth circuit, to reverse a decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the district of Washington, eastern division.

Now, therefore, if the said Mary McCune, by Daniel Donahue, her guardian *ad litem*, shall prosecute said appeal to effect and answer all damages and costs, that they will make said appeal good, then this obligation shall be void, otherwise to remain in full force and virtue.

MARY McCUNE,
By DANIEL DONAHUE,
Her Guardian ad Litem,
By MERRITT & MERRITT,
Solicitors for Appellants.
PRICE FRINT.
P. W. LAMONA.

Sealed and delivered, taken and acknowledged before me this 17th day of November, 1902.

[NOTARIAL SEAL.] SEABURY MERRITT,
Notary Public for Washington, Residing at Spokane.

39 STATE OF WASHINGTON, } ss:
County of Spokane, }

Price Frint and P. W. Lamona, being first duly sworn, each for himself says: That he is worth and has property in his own right in the State of Washington, worth the sum of $500 over and above all debts and liabilities, and exclusive of property, exempt from execution.

PRICE FRINT.
P. W. LAMONA.

Subscribed and sworn to before me this 17th day of November, 1902.

[NOTARIAL SEAL.] SEABURY MERRITT,
Notary Public for Washington, Residing at Spokane.

The within and foregoing bond is approved as to form and amount, this 17th day of November, 1902.

C. H. HANFORD,
District Judge.

(Endorsed:) Bond on appeal. Filed in United States circuit court, district — Washington, November 17th, 1902. A. Reeves Ayres, clerk. By Frank C. Nash, deputy.

40 And afterwards, to wit, on the 17th day of November, 1902, there was duly filed in said court, in said case, the citation on appeal in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Washington, Eastern Division.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Complainant and Appellant,
vs.
N. FRED ESSIG and EMMA C. ESSIG, His Wife, Defendants and Respondents.

Citation on Appeal (Copy).

UNITED STATES OF AMERICA, ss:

To N. Fred Essig and Emma C. Essig, his wife, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals, for the ninth circuit, to be holden at the city of San Francisco, in the State of California, on the first Monday of February, one thousand nine hundred three, pursuant to an appeal, filed in the clerk's office of the circuit court
41 of the United States for the district of Washington, eastern division, wherein Mary McCune, by Daniel Donahue, her

guardian *ad litem*, is appellant, and N. Fred Essig, and Emma C. Essig, his wife, are respondents, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 17th day of November, in the year of our Lord one thousand nine hundred and two.

C. H. HANFORD,
District Judge.

[Seal of Circuit Court.]

Attest: A. REEVES AYRES, *Clerk*,
By FRANK C. NASH, *Deputy*.

Due service of the within citation on appeal, by a true copy thereof, accepted this 17th day of November, 1902.

GRAVES & GRAVES,
Solicitors for Respondents.

(Endorsed:) Citation on appeal. Filed in the United States circuit court, district — Washington, November 17th, 1902. A. Reeves Ayres, clerk. By Frank C. Nash, deputy.

42 And afterwards, to wit, on the 17th day of November, 1902, there was duly filed in said court, in said case, a præcipe for transcript in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Washington, Eastern Division.

MARY McCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Complainant and Appellant,
vs.
N. FRED ESSIG and EMMA C. ESSIG, His Wife, Defendants and Respondents.

Præcipe for Transcript.

To the clerk of the above-named court:

You will please prepare and certify a transcript of the record on appeal to the United States circuit court of appeals, for the ninth circuit, in the above-entitled cause, and include in said transcript the following matters and papers now on file and a part of the record in said cause, to wit:

The transcript of the superior court of Washington, in and for the county of Lincoln, except the original complaint contained therein, and which transcript includes the following papers to wit:

43 Petition for guardian.
Order appointing guardian *ad litem*.
Summons and complaint.
Stipulation to amend complaint.
Amended complaint and exhibit.
Demurrer to amended complaint.
Petition for removal to United States circuit court.
Bond upon the petition to remove.
The order removing.
And also the following papers filed in said case in the United States circuit court for the district of Washington, eastern division, to wit:
The motion to remand.
The order denying the motion to remand.
The order sustaining the demurrer and dismissing the action.
The order allowing defendants to withdraw demurrer filed in State court.
The demurrer filed in United States circuit court.
The assignment of errors.
The petition and allowance of appeal.
The bond on appeal and the citation on appeal.

MERRITT & MERRITT,
Attorneys for Appellant.

(Endorsed): Præcipe for transcript of record on appeal. Filed in United States circuit court, district — Washington. November 17, 1902. A. Reeves Ayres, clerk. By Frank C. Nash, deputy.

44 In the Circuit Court of the United States for the District of Washington, Eastern Division.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian, *ad Litem*, Plaintiff and Appellant,
vs.
N. FRED ESSIG and EMMA C. ESSIG, His Wife, Defendants and Respondents.

Clerk's Certificate to Transcript.

I, A. Reeves Ayres, clerk of the circuit court for the district of Washington, do hereby certify that the above and foregoing transcript of pages from 1 to 51, inclusive, contain true and correct copies of the transcript of the superior court of the State of Washington in and for the county of Lincoln, except the original complaint therein contained, motion to remand to State court; order denying motion to remand to State court; order allowing defendants to withdraw demurrer filed in State court and for leave to file an original demurrer; original demurrer of defend-

ants to amended complaint; decree sustaining demurrer and
45 dismissing action; appeal and allowance; plaintiff's assignment of errors; bond on appeal; citation on appeal, and præcipe for transcript of record and clerk's certificate, in the above-entitled cause, which together constitute the transcript of the record and the return to the annexed writ of citation.

I further certify that the cost of the record herein amounts to the sum of 15.65, and that the same has been paid by Messrs. Merritt & Merritt, attorneys for plaintiff and appellant.

Witness my hand and the seal of said circuit court affixed at Spokane, Washington, in said district, this 25th day of November, A. D. 1902.

[SEAL.] A. REEVES AYRES, *Clerk*,
By FRANK C. NASH, *Deputy*.

(Endorsed:) No. 924. In the United States circuit court of appeals for the ninth circuit. Mary McCune, by Daniel Donahue, her guardian *ad litem*, appellant, *vs.* N. Fred Essig and Emma C. Essig, his wife, appellees. Transcript of record. Upon appeal from the United States circuit court for the district of Washington, eastern division. Filed December 12, 1902. F. D. Monckton, clerk.

46 *Supplemental Record.*

47 In the Circuit Court of the United States for the District of Washington, Eastern Division.

MARY McCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Complainant,
vs.
N. FRED ESSIG and EMMA C. ESSIG, His Wife, Defendants.

Caption.

Be it remembered, that on the 30th day of October, A. D. 1902, there was duly filed in said circuit court of the United States for the district of Washington, eastern division, the opinion of said court in the above-entitled cause, in the words and figures as follows, to wit: No. 954.

48 In the Circuit Court of the United States for the District of Washington, Eastern Division.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Complainant,
vs.
N. FRED ESSIG and EMMA C. ESSIG, His Wife, Defendants. } No. 954.

Opinion.

Filed October 30th, 1902.

Suit in equity. Heard upon motion to remand the case to the State court in which it was commenced, and upon a demurrer to the bill of complaint. Motion denied and demurrer sustained.

Statement of the Case by the Court.

The parties to this suit are all citizens of the State of Washington. The material facts averred by the amended bill of complaint are, that the complainant is a minor and daughter of William McCune, deceased, and his wife, Sarah McCune, now Sarah Donahue, and a step-daughter of Daniel Donahue, who appears as her guardian *ad litem*; that her parents settled upon a quarter section of land, situated in Lincoln county, in this State, while they were living together as bus-
49 band and wife, the land being then part of the public domain of the United States, and subject to entry under the homestead law, and after having made their settlement thereon William McCune on the 4th day of April, 1884 filed a claim to said land as a homestead in the proper district land office; that in the same year William McCune died intestate his only surviving heirs being his widow and the complainant, who continued to reside upon the land until December 17th, 1889, on which date the mother of complainant made the required proof in the land office of full compliance with all the requirements of the homestead law, and on the 6th day of March, 1891, a patent for said land was issued to her; that in the year of 1892, Mrs. Donahue sold and conveyed the land to the defendants, and they have been in possession ever since, and have appropriated the rents, issues and profits to their own use, and claim title to the whole of said land adversely to the complainant; that the value of the land is $6,400.00, and that the complainant is the owner of an undivided one-half thereof, and entitled to half the rents, issues and profits thereof from the time defendants took possession. A copy of the patent is annexed to the amended bill of complaint as an exhibit, from which it appears that the grantee is described therein as "Sarah Donahue, formerly the widow of William McCune, deceased," and the granting words are as follows: "That there is, therefore, granted by the United States unto the said

Sarah Donahue, the tract of land above described, to have and to hold the said tract of land, with the appurtenances thereof,
50 unto the said Sarah Donahue, and to her heirs and assigns forever." The object of the suit indicated by the averments and prayer of the bill is to obtain a decree establishing the complainant's claim of title to an undivided one-half of the land; for partition, or if that is impracticable to have the lands sold and the proceeds divided and to recover one-half the rents, issues and profits.

The homestead law, after prescribing the conditions under which public lands may be entered and the manner of making entries, provides that no certificate shall be given, or patent issued therefor until the expiration of five years from the date of the entry, "and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; * * * proves by two creditable witnesses that he, she or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit" and makes an affidavit of nonalienation, and takes an oath of allegiance to the Government of the United States, then "he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law." The law further provides as follows: "In case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children." (U. S. Rev. Stats., secs. 2291–92.)

The laws of Washington Territory in force in the year 1884, and still in force as laws of the State of Washington, provide that
51 all property acquired during coverture by either husband or wife shall be community property, and to dispose of or incumber community real estate the husband and wife must join in the execution of a "deed or other instrument of conveyance," and upon the death of either, leaving surviving children, if no testamentary disposition has been made of any part of the community property one-half thereof goes to the survivor and the other half descends to the children. (1 Ball. An. Codes & Stat. Wash., secs. 4488–89–90, 4621.)

This suit was commenced in the superior court of the State of Washington for Lincoln county, by service upon the defendants of a summons and copy of the complaint on the 29th day of April, 1902. A stipulation was signed by the solicitors who have appeared for the respective parties whereby it was agreed that an amended complaint should be filed, and that the defendants should have thirty days after service thereof within which to enter their appearance. Within the stipulated time, the defendants filed a demurrer to the amended complaint, and at the same time filed their petition and bond for removal of the case into this court, on the ground that the amended complaint tenders an issue which requires for its determination the construction and application of specified provisions of

the laws of the United States. A transcript of the record was filed and the case docketed in this court in due time. The complainant has failed to file any new pleadingin this court, but has removed to remand the case to the State court alleging in the motion three grounds, viz.: "1. The petition does not contain facts sufficient to warrant removal, nor to show that this court has jurisdiction.
52 2. The case does not involve any disputed question of Federal law. 3. The controversy between the parties must be determined by the laws of the State of Washington." The court denied the motion to remand, and the case was thereupon argued and submitted upon a demurrer to the amended bill of complaint.

The complainant's case is grounded upon the theory that by the entry, William McCune acquired a vested interest in the land; that the law entitles the widow of a deceased settler to receive a patent, but does not entitle *her to an beneficial — in* the land greater than, or different from, her interest therein at the time of the entry; that the patent when issued relates back to the date of the entry and confirms the title of the settler as if the grant had been perfected and title conveyed on that date; that the community property law of this State operates uniformly upon all property acquired by married persons, including property acquired by grant from the Government of the United States, so that in this instance the land in controversy is, by the doctrine of relation, to be deemed to have been acquired by Mr. and Mrs. McCune by purchase on April 4th, 1884, and upon the death of William McCune in that year the title to an undivided one-half thereof passed by descent to the complainant. In their argument upon the motion to remand and upon the demurrer, the solicitors for the complainant contended that the several propositions above stated are settled by previous decisions of the Supreme Court of the United States, so that there is now no disputed question of Federal law to be decided in adjudicating the rights of the parties to this suit.

53 Merritt & Merritt, for complainant.
Graves & Graves, for defendants.

HANFORD, *District Judge:*

The demurrer does not attack the bill of complaint on the ground of multifariousness, but is framed especially to raise the questions whether, under the homestead law, William McCune acquired any inheritable interest in the land, and whether the patent conveyed the title to the grantee in her own right, or constituted her a trustee for the complainant as to an undivided one-half of the land.

It appears to me that the vital question in this case is one of Federal law. The Government of the United States is the grantor of the title; the grant is made pursuant to the laws of the United States providing for the disposition of the public lands; the State of Washington is not a party to the grant, it never had power to legislate with respect to the disposition of the public lands of the

United States within its boundaries, and the complainant does not deraign title from the State, but claims an undivided one-half of the estate conveyed by the patent, although her name does not appear in it, and she cannot brush the patent aside without impairing the foundation of her claim. If the patent could be eliminated, the complainant would then have to go back of the patent and rest her claim upon the law, and it is a national law and not a law of the State which must be applied, and construed. In their argument upon the demurrer, counsel for complainant called my attention to the following very excellent rule, found in the opinion of the Supreme Court in the case of Wilcox *v.* Jackson, 13 Peters, 517:

54 "We hold the true principle to be this, that whenever the question in any court, State or Federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the State, is subject to State legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."

Under this rule, to bar the jurisdiction of a United States circuit court, it is necessary for the complainant to admit not only that the title of the United States has been conveyed, but also that the title "vested according to the laws of the United States," and it is impossible to keep questions of Federal law out of the case, without a plain admission that the patent conveyed the title to the patentee, absolutely. That admission, if made, would leave no controversy for any court to settle. The complainant denies that the title vested in the patentee absolutely, and claims adversely to the patentee, therefore, the question whether her claim is valid or not, "must be resolved by the laws of the United States."

If it were true that the complainant's claim to an undivided one-half of the land in controversy rests upon settled principles of law, an easy way to prove it would be to cite decisions of the Supreme Court of the United States, applicable to the facts of the case, but

55 if the Supreme Court has ever decided that a homestead settled by his entry acquires a vested interest in the land before he has fulfilled the conditions prescribed by the law, or that a patent issued to the widow of a deceased settler conveys any beneficial interest to the heirs of the deceased settler, or that any State law can be in any case effective, to divert the transmission of the title to public land from the National Government to the one designated by the law to receive the patent, so as to vest the title in a person other than the patentee, my attention has not been directed to the decision.

All of the Supreme Court decisions cited in the argument in behalf of the complainant approach the questions in the case only remotely, and the general principles which they confirm are not ap-

plicable to the facts in this case. I will review them in chronological order.

Witherspoon *vs.* Duncan, 4 Wall., 210–220, was a tax case, and the question was whether the land which had been granted by an act of Congress to individuals could be taxed by the State before the patent issued, and the court decided that as the grantees had performed all the conditions precedent and obtained a certificate of entry, the land was private property and subject to taxation. In the opinion the court said:

"In no just sense can the lands be said to be public lands after they have been entered at the Land Office and a certificate of entry obtained. * * * The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The Government agrees to make proper conveyance as soon as it can and in the meantime holds the naked legal title in trust for the purchaser, who has
56 the equitable title * * * The power to tax exists as soon as the ownership is changed, and this is effected when the entry is made on the terms and in the modes allowed by law."

In this decision the court applied the same principle which had previously been announced in the case of Carroll *vs.* Safford, 3 How. 441, in which the lands affected had been acquired by cash entry, to land donated by an act of Congress, The entries referred to in these decisions were the transactions in the Land Office when the price was paid for the land by a purchaser or when the final proof was made in compliance with conditions precedent to the acquisition of ownership under a donation law. Such entries are quite different from the transaction designated as a "homestead entry," which is the initial step taken in the Land Office toward acquiring ownership under the homestead law, and precedes the performance on the part of a homestead claimant of the conditions of residence upon and improvement of the land, which constitute the real consideration for the transfer of the title, and which are conditions precedent to the vesting of title in the homestead settler. Upon the argument, it was confessed that the Supreme Court had not decided in any case that unpatented lands become subject to taxation by a State government before full compliance on the part of grantees with the requirements of the laws of the United States, which must precede the conveyance of title from the National Government.

In the case of Shepley *vs.* Cowan, 91 U. S. 330–340, the Supreme Court announced the rule, that the party who is first in taking
57 the initiatory step toward acquiring lands from the United States pursuant to laws enacted by Congress, "If followed up to patent, is deemed to have acquired the better right as against others to the premises. The patent which is afterward issued relates back to the date of the initiatory act, and cuts off all intervening claimants." And the court also said in that case:

"But whilst, according to these decisions, no vested right as against the United States is acquired until all the prerequisities for the ac-

quisition if the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States shall have determined to sell or donate the property. In all such cases, the first in time in the commencement of proceedings for the acquisition of title, when the same are regularly followed up, is deemed to be the first in right."

In this paragraph of the opinion, reference is made to previous decisions of the court in Frisbie *vs.* Whitney, 9 Wall. 187, and the Yosemite Valley case, 15 Wall. 77, in which it was decided that settlers claiming lands under the pre-emption laws did not thereby acquire such a vested interest in the premises as to deprive the Government of the power to improve the lands which they claimed within a reservation for public uses or to make other disposition thereof.

The opinion in Shepley *vs.* Cowan, was written by Mr. Justice Field, and the doctrine of relation, to which reference is made, will be better understood by referring to the explanation of the doctrine which the same learned justice had previously given in the
58 opinion of the Supreme Court in the case of Gibson *vs.* Chouteau, 13 Wall. 100, as follows:

"By the doctrine of relation is meant that principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as conveyance or deed. The last proceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first proceeding was had. Thus, in the present case, the patent, which was issued in 1862, is said to take effect by relation at the time when the survey and plat of the location, made in 1818, were returned to the recorder of land titles under the act of Congress. At that time the title of the claimant to the land desired by him had its inception, and so far as it is necessary to protect his rights to the land, and the rights of the parties deriving their interests from him, the patent is held to take effect by relation as of that date.

"The supreme court of Missouri, considering that by this doctrine of relation, the legal title, when it passed out of the United States by the patent, instantly dropped back in time to the location of the first act or inception of the conveyance, and vested the title in the owner of the equity as of that date, held that the statute intercepted the title as it passed through the intermediate conveyances from that period to the patentee. 'The legal title,' said the court, 'in making this circuit, necessarily runs around the period of the statute
59 bar, and the action founded upon this new right is met by the statute on its way, and cut off with that which existed before.'

"The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts

solely for the purposes of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land, and acquired the equitable claim or right to the title."

This court would commit a much more transparent error than the one pointed out in the decision of the supreme court of Missouri by granting a decree in favor of the complainant, upon the theory that by this doctrine of relation the legal title to the land in controversy when it passed out of the United States by the patent to Mrs. Donahue, instantly dropped back in time to the inception of her deceased husband's claim, and that the community property law of this State intercepted the title as it passed from the United States to the patentee, and operating in combination with the doctrine of relation, created a vested estate in a dead man.

In the case of Hastings & Dakota R. R. Co. *vs.* Whitney, 132 U. S. 357–366, the court held that a homestead entry valid upon its face and regarded as legal by the officers of the Land Department, is such an appropriation of the tract as segregates it from the mass of public land, and excepts it from a subsequent grant by Congress to a State for the purpose of aiding in the construction of a railroad, reaffirming the doctrine in the case of Wilcox *vs.* Jackson, 13 Peters, 498,

"that a tract lawfully appropriated to any purpose becomes
60 thereafter severed from the mass of public land, and that no subsequent law or proclamation will be construed to embrace it or to operate upon it, although no exception be made of it."

The opinion contains an inaccurate statement, to the effect that in Witherspoon *vs.* Duncan, 4 Wall. 210, and Carroll *vs.* Safford, 3 How. 441, the court had held the rule that "lands originally public cease to be public after they have been entered at the Land Office and a certificate of entry has been obtained," to be applicable "as well to homestead and pre-emption as to cash entries."

This decision falls far short of being an authoritative declaration that the ownership of public land becomes changed by the initial filing in the Land Office of a homestead claim. It is in line with numerous decisions of the Supreme Court holding that homestead and pre-emption claims appearing of record in the Land Office except the tracts which they cover from grants made in aid of railway construction, and it does not purport to be a decision of the question as to the time when a homestead settler acquires an inheritable interest in land.

Sturr *vs.* Beck, 133 U. S. 541–552, involved a contest with respect to water rights between parties claiming title to separate tracts of land which had been patented under the homestead law, and in the decision the court again applied the familiar rule of equity that in a contest between parties whose equities are in other respects equal, priority in time gives superiority of right. The condensed statement of the decision in the syllabus of the case is as follows:

"The filing of a homestead entry of a tract across which a
61 stream of water runs in its natural channel with no right or claim of right to divert it therefrom, confers a right to have the stream continue to run in that channel, without diversion; which right, when completed by full compliance with the requirements with the statutes on the part of the settler, and issue of a patent, relates back to the date of filing, and cuts off intervening adverse claims to the water."

The decisions quoted from an opinion by Attorney General McVeagh, to the effect that, "where a homestead entry of public land has been made by a settler, the land so entered, cannot, while such entry stands, be set apart by the President for a military reservation, even prior to the completion of full title in the settler;" and that the right of a homestead settler amounts to an equitable interest in the land, and until forfeited by failure to perform the conditions it must prevail not only against individuals but against the Government. The opinion also contains other quotations, and a general discussion of different features of the public land laws, but without adopting the decision of the Attorney General referred to or announcing any rule of law applicable to the question which this court has now to consider. The question in that case, as stated in the opinion of the court, was not as to the extent of a homestead settler's interest in his homestead as against the Government, but was whether as against his adversary prior occupancy and settlement and entry was a lawful prior appropriation of the water in the stream flowing through his homestead.

One paragraph of the opinion contains the following commentary on that part of the opinion in the case of Witherspoon *vs.* Duncan, which I have quoted:

62 "It may be said that this language refers to the certificate issued upon final proof, but if the word 'entry,' as applied to the appropriation of land, means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim (Chotard *vs.* Pope, 12 Wheat. *596–588*), the principle has a wider scope."

This is a mere suggestion rather than a conclusion or decision that under the homestead law a settler on public land by filing his preliminary application acquires anything more than an inchoate right. In the case of Dealy *vs.* United States, 152 U. S. 539–547, the Supreme Court recognized a substantial difference in the meaning of the word "entry" in cash purchase and pre-emption cases from the popular understanding of the word when used in connection with proceedings to acquire title under the homestead law, and gave to the words a broad interpretation according to popular understanding, comprehending the proceedings as a whole to complete the transfer of title, which in a homestead case is equivalent to an entry when land is sold by the Government for cash.

In the case of Bardon *vs.* N. P. R. R. Co., which is the last of the Supreme Court decisions cited in support of the argument in behalf of

the complainant, the Supreme Court found the facts to be, that the claim to the land in controversy was initiated in the year 1855; that the settler subsequently filed his declaratory statement, pursuant to the preemption laws, and after his death his heirs paid the purchase price for the land and a certificate of the entry was issued to them;
63 that the entry remained of record in the Land Office until August 5th, 1865, on which date it was canceled. Upon these facts the court decided that the land was excepted from the grant made to the Northern Pacific Railroad Company by the act of Congress of July 2, 1864, and that the cancellation of the entry in 1865, did not bring the land under the operation of the grant to the railroad company. The decision reaffirms the declaration, often repeated in the decisions of the Supreme Court, to the effect that when the records of the Land Department show that a tract of land has been claimed pursuant to law, and a right to it initiated by a filing which is apparently regular, it is segregated from the mass of public land, and until such claim has been extinguished, such tract is deemed to be appropriated and excepted from any grant of public lands, made while it is in that condition, and this is so whether the claim is valid in law, or invalid for any reason. This rule of law is fully expounded in the later decisions of the Supreme Court in Whitney *vs.* Taylor, 158 U. S. 85–98; Parsons *vs.* Venzke, 164 U. S. 89–92; N. P. R. R. Co. *vs.* Colburn, 164 U. S. 383–388; N. P. R. R. Co. *vs.* Sanders, 166 U. S. 620–637; N. P. Ry. Co. *vs.* De Lacey, 174 U. S. 622–639.

The decisions of the Supreme Court cited and relied upon, whether considered singly or with respect to any general rule deducible from all of them, do not support the contention that the complainant's claim of ownership to an undivided one-half of the land in controversy is founded upon provisions of the homestead law which have been construed and settled by the Supreme Court.

64 A vested right to a patent conveying the title to a tract of land is equivalent to a patent issued, and refers back to the inception of the right of the patentee, but only so far as it may be necessary to cut off intervening claimants. (Stark *vs.* Starrs, 6 Wall. 418.)

This rule is not available to diminish the estate conveyed by the patent, nor to support a claim adverse to the patentee. No right to a patent is acquired under the homestead law, until all the conditions precedent prescribed by law, have been fully performed. The death of a man who has initiated a right, occurring before he has fulfilled the prescribed conditions, intercepts his right, and then his widow, if there be a surviving widow, becomes his successor in right, and may complete what he has left undone, and becomes entitled to a patent conveying the full title to her in her own right as the direct grantee of the Government, and not by inheritance from her deceased husband, and while she survives, children can acquire no right to any interest in the homestead. This is the policy of the homestead law plainly expressed in its provisions. If the community property law of this State has any effect upon the rights of the parties in this

case, it would apply as well to a supposable case where a man who at the time of filing his homestead application is a naturalized citizen and a widower, having alien children living in Europe, and who while occupying the land and claiming it becomes married to a second wife and afterward dies before the expiration of five years from the date of filing his homestead application. If the argument made in this case is sound, in the supposed case the homestead would be the husband's separate property, and the surviving widow by fulfilling the requirements of the law and obtaining a patent would become the owner of only an undivided one-third of the land, and the alien children would take the other two thirds by inheritance from their deceased father, contrary to the intention of Congress, expressed in the homestead law, to bestow the bounty of the Government only upon citizens of this country who occupy and improve the portions which they receive.

65

The provisions of the homestead law are similar to the Oregon donation law, and the policy of the Government is identical in both statutes, and it is my opinion that the decision of this case must be controlled by the case of Hall *vs.* Russell, 101 U. S. 503–514, in which the Supreme Court construed the provisions of the donation law, and held that it made no grant of land to a settler until the completion of his residence upon and cultivation of the land for the prescribed period; that down to that time he was an authorized settler but not a grantee; that upon his death prior to the expiration of that period his rights, but not the land, descended to his heirs; that upon making the required proof the heirs became entitled to a patent conveying the title to them as donees of the Government, but that the title was not by inheritance from the deceased but by grant directly from the United States, and that a statute enacted by the legislatute of Oregon Territory, providing that a settler's claim might descend to his heirs as real estate, and that his possessory right might be disposed of by will, conflicts with the act of Congress and that the territorial government, could not add to nor take from the grant. (See, also, Hershberger *vs.* Blewett, 55 Fed. Rep. 170.) Uniformity in the rules to be applied in the interpretation of similar statutes is desirable, and as the Supreme Court has not construed the homestead law differently I consider the principles of the decision in Hall *vs.* Russell, to be the safest and best that can be applied to it, and by those principles I am guided to the conclusion that a patent issued to a widow pursuant to the homestead law conveys the land to her absolutely, and that no interest therein passes by inheritance to children of her husband. (Cooper *vs.* Wilder (Cal.), 43 Pac. Rep. 591.)

66

The demurrer is sustained, and a decree will be entered denying that the complainant has any equitable right to or interest in the land described in her bill of complaint.

C. H. HANFORD, *Judge.*

(Endorsed:) Opinion. Filed October 30th, 1902. A. Reeves Ayres, clerk. By Frank C. Nash, deputy.

67 And afterward, to wit, on the 8th day of December, 1902, there was duly filed in said case in said court a præcipe for a supplemental transcript of record, in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Washington, Eastern Division.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Complainant,
vs.
N. FRED ESSIG and EMMA C. ESSIG, His Wife, Defendants. } No. 954.

Præcipe for Supplemental Record.

To the clerk of the above-entitled court:

You will please prepare and certify a copy of the opinion of the court in the above-entitled cause, and forward to clerk of the United States circuit court of appeals, as a supplemental transcript in said case.

MERRITT & MERRITT,
Attorneys for Plaintiff in Error.

(Endorsed:) Præcipe for supplemental transcript. Filed December 8th, 1902. A. Reeves Ayres, clerk. By Frank C. Nash, deputy.

68 In the United States Circuit Court for the District of Washington, Eastern Division.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Complainant,
vs.
N. FRED ESSIG and EMMA C. ESSIG, His Wife, Defendants. } No. 954.

Clerk's Certificate to Supplemental Transcript.

I, A. Reeves Ayres, clerk of the circuit court of the United States, in and for the district of Washington, do hereby certify that the above and foregoing supplemental transcript of record of pages from one (1) to eighteen (18), inclusive, contain true and correct copies of the opinion of the court in the above-entitled cause, and the præcipe for said supplemental transcript of record, as the same appear on file and of record in my office.

I further certify that the cost of the supplemental record herein amounts to the sum of $5.75, and that the same has been paid by Messrs. Merritt & Merritt, attorneys for plaintiff and appellant.

69 Witness my hand and the seal of said circuit court affixed at Spokane, Washington, this 11th day of December, A. D. 1902.

[SEAL.] A. REEVES AYRES, *Clerk*,
By FRANK C. NASH, *Deputy*.

(Endorsed:) No. 924. In the United States circuit court of appeals for the ninth circuit. Mary McCune, by Daniel Donahue, her guardian *ad litem*, appellant, *vs.* N. Fred Essig and Emma C. Essig, his wife, appellees. Supplemental transcript of record (opinion and præcipe). Upon appeal from the United States circuit court for the district of Washington, eastern division. Filed December 15, 1902. F. D. Monckton, clerk.

70 At a stated term, to wit: the October term A. D. 1902 of the United States circuit court of appeals for the ninth circuit, held at the court room, in the city and county of San Francisco, on Friday the sixth day of February in the year of our Lord one thousand, nine hundred and three:

Present: The Honorable William B. Gilbert, circuit judge, Honorable Erskine M. Ross, circuit judge, Honorable William W. Morrow, circuit judge.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Appellant,
v.
N. FRED ESSIG and EMMA C. ESSIG, His Wife, Appellees. } No. 924.

Order of Submission.

Ordered, appeal argued by Will G. Graves, Esquire, counsel for the appellees, no one appearing for the appellant, and submitted to the court for consideration and decision.

I hereby certify that the foregoing is a full, true and correct copy of an original order made and entered in the within entitled cause.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this — day of —— A. D. 190–.

——, *Clerk*.

71 In the United States Circuit Court of Appeals for the Ninth Circuit.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Appellant,
vs.
N. FRED. ESSIG and EMMA C. ESSIG, His Wife, Appellees. } No. 924.

Opinion.

Merritt & Merritt, for appellant.
Graves & Graves, for appellees.

Before Gilbert, Ross, and Morrow, circuit judges.

GILBERT, circuit judge, delivered the opinion of the court:

William McCune and his wife settled upon a quarter section of land in Lincoln county, Washington, under the homestead law of the United States, and on April 4, 1884, he filed, in the proper district land office, a claim to said land as a homestead. In the same year he died intestate, his widow, Sarah McCune, and his daughter, the appellant herein, surviving him. On Dec. 17, 1889 the widow, then Sarah Donahue, made proof in the land office of full compliance with the requirements of the homestead law and on March 6, 1891, a patent was issued to her therefor, granting the said land to her "to have and to hold the said tract of land with the appurtenances thereof unto the said Sarah Donahue and to her heirs and assigns forever."

72 Subsequently she conveyed the land to the appellees. The present suit is brought by her daughter to establish a claim to an undivided one half interest in the land on the theory that although the patent was issued to her mother, the homestead was by virtue of the law of Washington community property, and William McCune, before making final proof and before completing his residence, had a vested inchoate, or equitable title to the homestead, and that upon his death his right or equity descended to the widow and to the appellant according to the law of the State in which the land is situated. The circuit court held adversely to this contention.

On the appeal the question is presented whether the cause was removable from the State court to the circuit court of the United States. It is contended that no Federal question is involved in the controversy for the reason that the patent having issued to the widow of William McCune, the only question involved is one of the construction of the statutes of descent of the State of Washington. We think the true controversy in this case concerns the construction to be given secs. 2291 and 2292 of the Revised Statutes. The first of the e sections prescribes the conditions under which land may be en-

tered under the homestead law and declares that "no certificate, however, shall be given or patent issued therefor until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years
73 immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land had been alienated except as provided in section twenty-two hundred and eighty-eight, that he, she, or they will bear true allegiance to the Government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent as in other cases provided by law." Sec. 2292 further provides: "In case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children." The statute expressly authorizes the issuance of the patent to the widow of the deceased homestead settler. It makes no provision for the children of such settler and in its terms contains no recognition of any right initiated by him. The question presented is whether or not the widow was a donee in her own right of the land from the United States. If she were such donee the statutes of the State of Washington were powerless to divest her of her interest or to charge with a trust the title so patented to her. The whole case turns on the construction of the homestead act and clearly exhibits in our opinion ground for removing the cause to a court of the United States. The law of the State of Washington governs the descent of lands lying within the State, but the question here is whether there had been any descent of land. That question depends on the nature of the estate which the widow of William McCune took in the land by virtue of her compliance with the homestead law and the patent which issued to her.

Counsel for the appellant rely upon Gold Washing & Water Co. *v.* Keyes, 96 U. S., 199; Romie *et al. v.* Vasanova, 91 U. S., 379; McStay *et al. v.* Friedman, 92 U. S., 723; Hoadley *v.* San Francisco, 94 U. S., 4; Blackburn *v.* Portland Gold Mining Co., 175 U. S.,
74 571, as supporting the doctrine that after the United States has parted with its title to land, any dispute concerning the same which does not bring in question the validity of the grant, presents no Federal question, and they assert that in this case they make no question of the validity of the grant to the widow of William McCune, but they contend that the question whether she took the beneficial interest as well as the legal title depends upon the effect to be given to the State statutes and not upon the acts of Congress. None of the decisions so cited applies to the case which we have before us. The case chiefly replied upon is Hoadley *v.* San

Francisco. In that case the grant was of the right and title of the United States to lands within the corporate limits of the city of San Francisco. It was a grant to the city and to its successors for certain beneficiaries. Hoadley claimed to be one of the beneficiaries, and the court said that the question involved "did not arise under the laws of the United States, but under the ordinances of the city as ratified by the act of the legislature." *In that case the trust was* expressed in the grant. The only question before the court was, who were the beneficiaries? We agree with the circuit court that an apt rule is found in the opinion of the Supreme Court in the case of Wilcox *v.* McConnell, 13 Peters, 517, in which the court remarked: "We hold the true principle to be this, that whenever the question in any court, State or Federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the State, is subject to the State legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States." The Supreme Court entertained jurisdiction
75 of similar cases in Bernier *v.* Bernier, 147 U. S., 242 and Hutchinson Investment Co. *v.* Caldwell, 152 U. S., 65. We find no error in the ruling of the circuit court in refusing to remand the cause to the State court.

Nor do we find error in the conclusion which was reached by the circuit court on the merits of the case. The estate granted to a homestead settler is granted on conditions precedent. These conditions are residence for the required time, cultivation, and final proof. Until all of these conditions are complied with, the law gives him no more than the right of possession. It provides that in case of his death before the completion of the conditions, his widow shall have all the rights which he would have had. His right is extinguished by his death and she, in virtue of the fact that she is his widow, is designated as the donee of the land. The statute provides for the rights of the children only in case of the death of both father and mother before the final proof and declares that the right and fee shall inure to the benefit of such children. In Bernier *v.* Bernier, 147 U. S., 246, the court held that if the homestead entryman die a widower, without acquiring patent, the right to complete the proofs and acquire the patent passes to all his children as well to those who are adults as to those who are infants. That conclusion was reached by construing together both section 2291 and section 2292. In the course of the opinion the court remarked that the object of the sections in question was, "to provide the method of completing the homestead claim and obtaining a patent therefor, and not to establish a line of descent or rules of distribution of the deceased entryman's estate." This expression of the opinion is relied upon by the appellant as authority for the contention that the title so granted under the homestead law was not intended to be free from

the control of the State statutes of descent, but we find
76 in it no such meaning. The court in that case recognized the right of all the surviving children of the entryman to share equally in the homestead, but so held, not out of consideration of a State statute of descent, but on account of the meaning of the two sections so quoted from the homestead law, in other words, the court applied and gave force only to the homestead law as it was expressed, and very correctly observed that it was not the purpose of the homestead law to establish a line of descent or rule of distribution, but it was to determine who were the grantees of the Government and who were entitled to receive the patent therefor. The case of Hall *v.* Russell, 101 U. S., 503, is, we think, directly in point. That was a case which involved the construction of the donation act, an act in which the terms of the grant are much stronger than in the case of the homestead law, the language thereof being: "There shall be, and hereby is, granted," the grantee being any qualified settler or occupant of the public lands, "who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act." It further provided that if a settler died before the expiration of the required four years of continued possession, all his rights should descend to his heir-at-law, including his widow. The court held that until such settler was qualified to take, there was no actual grant of the land and that if such a settler should die after a residence thereon of less than the required four years, he had no devisable interest therein.

The appellant invokes the doctrine of relation as it is expressed in Shepley *v.* Cowan *et al.*, 91 U. S., 330. In that case the court held that where a State seeks to sell land as part of the lands included in a grant to it, and a settler seeks to acquire a right of pre-emption to the same land, the party taking the first initiatory steps, if the same have been followed up to patent,
77 acquires the better right, and that the patent relates back to the date of the initiatory act and cuts off all intervening claims. That doctrine has no application to the facts of the present case. There were no rival claims to the land which was included in the homestead which was granted to the widow of William McCune. Her right was not adverse to that of her husband. By virtue of the fact that both were settlers on the land for the purpose of obtaining a homestead and her husband died before the conditions of the grant were complied with, she became the donee of the title. Her husband had nothing to which the doctrine of relation could apply. In the case of Shepley *v.* Cowan, the court referred to its previous decision in Gibson *v.* Chouteau, 13 Wall., 100, where the doctrine of relation was thus defined: "By the doctrine of relation is meant that principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as conveyance or deed. The last pro-

ceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first proceeding was had." Of what avail would it be to the appellant in this case to invoke that doctrine and to assert that the patent which issued to the widow of McCune took effect by relation at the time when the settlement was made by him? Conceding that it relates back to and takes effect at that date, it can nevertheless detract nothing from the effect of the widow's title. Her title, as well, relates back to the initiatory act, and for her benefit only and not for the benefit of the heirs of the deceased entryman. McCune never received a grant from the United States nor acquired any interest in the land which could descend to his heirs. The supreme court of Washington has never applied the doctrine of relation to a case such as that which is now under considera-
78 tion, nor has that court held the land acquired under the homestead laws of the United States to be community property in any case where the husband and wife resided thereon for a shorter time than the period required by those laws in order to acquire title. In Kromer *v.* Friday, 10 Wash., 621, Kromer had made an entry upon land of the United States under the homestead act and settled on the same together with a woman whom he married after he had made final proof and received the final certificate, but before the issuance of the patent. It was held that the patent vested the title in the community, but the court ruled in that case that the fact that the marriage ceremony was performed under those circumstances was not proof that the s-ttlers had not been married at the time of the settlement. In Bolton *v.* La Camas Water Co., 10 Wash., 246, the husband and wife established a homestead and lived thereon six years, when the wife died. Final proof was made later by the husband and patent issued to him. The husband thereafter married a second wife. It was held that the husband, upon the issuance of the patent, took the full legal title, and upon his conveyance of the land to a grantee who was ignorant of the equities of the first wife's heirs, both the legal and equitable titles would pass. In Ahern *v.* Ahern *et al.*, recently decided by the supreme court of Washington, it appeared that Ahern and his wife made a homestead entry, lived thereon and complied with the rules and regulations relating to homesteads for more than six years. After the wife's death the husband made final proof and subsequently received a patent. It was held that the equitable title having vested in the community before the wife's death, the legal title also vested in the community, and the court affirmed the rule in Kromer *v.* Friday that land so acquired is taken by purchase by reason of the settlement and improvements thereon in which both husband and wife participated and is consequently community property.
79 In Harris *v.* Harris, 71 Cal., 314, an unmarried woman after acquiring the initiatory right to pre-empt certain public land of the United States, married and during her marriage paid the Government price for the land and received a patent therefor. It

was held that the property so acquired became her separate estate and was not community, and this irrespective of the fact that the money may have been paid out of the community property. The court said: "Can the husband say that he obtained an interest in the pre-emption claim prior to the certificate of purchase by reason of the payment with his consent of money of which he had the control? Such a claim would seem to be invalid, because the express or implied agreement that he should have such an interest would be in fraud of the United States statute." In Labish *v.* Hardy, 77 Cal., 327, it was held that a joint occupancy by husband and wife of land in the town of Santa Cruz which terminated by the death of the wife ten years before the act of Congress to quiet title to lands in said town, approved July 23, 1866, would not constitute the land community property as against the grant made by the town to the husband as a *bona fide* occupant at the time of the passage of the act. We find no error in the rulings of the circuit court. The judgment is affirmed.

(Endorsed:) Opinion. Filed May 4, 1903. F. D. Monckton, clerk.

80 United States Circuit Court of Appeals for the Ninth Circuit.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Appellant, *v.* N. FRED ESSIG and EMMA C. ESSIG, His Wife, Appellees.	No. 924. Decree United States Circuit Court of Appeals.

Appeal from the circuit court of the United States for the district of Washington, eastern division.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Washington, eastern division, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be, and the came is hereby, affirmed, with costs.

(Endorsed:) Decree. Filed and entered May 4, 1903. F. D. Monckton, clerk.

81 In the United States Circuit Court of Appeals for the Ninth Circuit.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Plaintiff and Appellant,
v.
N. FRED ESSIG and EMMA *G.* ESSIG, His Wife, Defendants and Appellees.

The above named plaintiff, conceiving herself aggrieved by the decree made and entered on the 4th day of May, 1903, in the above entitled cause, does hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authen-i-cated, may be sent to the Supreme Court of the United States.

MERRITT & MERRITT,
Attorneys for Plaintiff.

Dated at Spokane this 22nd day of March, A. D., 1904.

The foregoing claim of appeal is allowed.
Dated this 3rd day of May, 1904.

WM. B. GILBERT,
Circuit Judge.

(Endorsed:) Petition for, and order allowing appeal to Supreme Court U. S. Filed May 3, 1904. F. D. Monckton, clerk.

82 In the United States Circuit Court of Appeals for the Ninth Circuit.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Plaintiff and Appellant,
v.
N. FRED ESSIG and EMMA *G.* ESSIG, His Wife, Defendants and Appellees.

Plaintiff having claimed an appeal in the above entitled cause, said appeal having been allowed by the court, now petitions the court for an order fixing the amount of the appeal bond herein.

MERRITT & MERRITT,
Attorneys for Plaintiff.

On the above and foregoing application the amount of the appeal bond herein is fixed at five hundred dollars ($500.00).
Dated this 3rd day of May, 1904.

WM. B. GILBERT,
Circuit Judge.

(Endorsed:) Petition for order fixing amount of bond on appeal to Supreme Court U. S. and order thereon. Filed May 3, 1904. F. D. Monckton, clerk.

83 In the United States Circuit Court of Appeals for the Ninth Circuit.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Plaintiff and Appellant,
v.
N. FRED ESSIG and EMMA *G.* ESSIG, His Wife, Defendants and Appellees.
} Assignment of Errors.

The plaintiff prays an appeal from the final decree of this court to the Supreme Court of the United States and assigns for error:

I.

The court erred in holding that the controversy arising in the above entitled cause was to be determined under and by virtue of the homestead laws of the United States of America and in assuming jurisdiction of said cause.

II.

The court erred in refusing to remand said cause to the *district* court with directions to said *district* court to grant the motion of plaintiff to remand said cause to the State court from whence it came.

III.

The court erred in failing and declining to hold that said controversy was to be determined under and by the laws of the State of Washington.

84 IV.

The court erred in failing and declining to hold that the determination of said controversy did not involve the construction of the Constitution, or any treaty or law of the United States.

V.

The court erred in failing and declining to hold that the patent described in the complaint herein did not relate back and take effect as of the time when the title was initiated.

VI.

The court erred in failing and declining to hold that the title to the real estate involved in this controversy having passed according

to the laws of the United States, and the United States not being a party and the validity of said patent not being attacked that the property conveyed by said patent, like all other property within the State, is subject to State legislation, and that the beneficial interests in and to said property are to be determined by the courts of the State of Washington, under the provisions of the legislation of said State provided, however, that said legislation is consistent with the admission that the title passed and vested according to the laws of the United States.

VII.

That the court erred in affirming the order and decree of the *district* court.

VIII.

That the court erred in failing and declining to enter an order overruling the demurrer to said complaint.

85 Wherefore plaintiff prays that the order and decree of said circuit court be reversed.

MERRITT & MERRITT,
Attorneys for Plaintiff.

(Endorsed:) Assignment of errors. Filed May 3, 1904. F. D. Monckton, clerk.

86 In the United States Circuit Court of Appeals for the Ninth Circuit.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Plaintiff and Appellant,
v.
N. FRED ESSIG and EMMA *G.* ESSIG, His Wife, Defendants and Appellees.
} Appeal Bond.

Know all men by these presents, that we, Mary McCune by Daniel Donahue, her guardian *ad litem*, as principal, and American Bonding Company of Baltimore, a corporation, organized and existing under the laws of the State of Maryland and authorized to do business in the State of Washington, as surety, are held and firmly bound unto N. Fred Essig and Emma *G.* Essig, his wife, in the full and just sum of five hundred ($500.00) dollars to be paid to the said N. Fred Essig and Emma *G.* Essig, their attorneys, executors, administrators or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 17th day of May, A. D., in the year of our Lord one thousand nine hundred and four.

Whereas, lately at the United States court of appeals for the ninth circuit on the 4th day of May, 1903, in a suit pending in said court, between Mary McCune by Daniel Donahue her guardian *ad litem*, plaintiff, and N. Fred Essig and Emma *G.* Essig, his wife, de-
87 fendants, a decree was rendered against said plaintiffs and said plaintiffs having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit and a citation directed to said defendants citing and admonishing them to be and appear at the Supreme Court of the United States holden at the city of Washington within sixty (60) days from the 3rd day of May, A. D., 1904.

Now, the condition of the above obligation is such that if the said plaintiff shall prosecute her appeal to effect and answer all damages and costs if she fail to make her plea good then the above obligation to be void; else to remain in full force and virtue.

MARY McCUNE,
By DANIEL DONAHUE,
Her Guardian ad Litem,
By MERRITT & MERRITT,
Her Attorneys.
AMERICAN BONDING COMPANY OF BALTIMORE,
By W. S. GILBERT, *Vice-Pres't.*

Attest:
[SEAL.] C. M. WHEELER, *Ass't Sec'y.*

Approved May 23, 1904.
WM. B. GILBERT,
U. S. Circuit Judge for the Ninth Circuit.

(Endorsed:) Appeal bond. Filed May 23, 1904. F. D. Monckton, clerk.

88 In the United States Circuit Court of Appeals for the Ninth Circuit.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Appellant,
v.
N. FRED ESSIG and EMMA C. ESSIG, His Wife, Appellees.
} No. 924.

Certificate of Clerk U. S. C. C. A. to Transcript.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing eighty-seven (87) pages, numbered from one (1), to eighty-seven (87), inclusive, to be a true copy of the record and of the assignment of errors, and of all proceedings had in the said case in the United States circuit court of appeals for the ninth circuit, including the opinion filed,

as the same remain of record in my office, and that the same, together, constitute the transcript of record in the above entitled cause upon appeal to the Supreme Court of the United States.

Attest, my hand and the seal of the said the United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 7th day of June, A. D., 1904.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

89 In the United States Court of Appeals for the Ninth Circuit.

MARY MCCUNE, by DANIEL DONAHUE, Her Guardian *ad Litem*, Plaintiff and Appellant,
v.
N. FRED ESSIG and EMMA *G.* ESSIG, His Wife, Defendants and Appellees.
} Citation.

THE UNITED STATES OF AMERICA, ss:

The President of the United States to N. Fred Essig and Emma *G.* Essig, his wife, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the city of Washington, within sixty days, from the date of this writ, pursuant to an appeal, duly allowed by the United States circuit court of appeals for the ninth circuit, and filed in the clerk's office of said court on the 3rd day of May A. D. 1904; in a cause wherein Mary McCune is appellant, and you are appellees, to show cause, if any, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William B. Gilbert, United States circuit judge of the ninth circuit, this 3rd day of May A. D. 1904.

WM. B. GILBERT,
U. S. Circuit Judge.

Service of a copy of the within citation is hereby admitted this 17 day of May, A. D. 1904.

GRAVES & GRAVES,
Attorneys for Appellees.

[Endorsed:] No. 924. United States circuit court of appeals for the ninth circuit. Mary McCune etc., appellant, *v.* N. Fred Essig *et ux.* Citation on appeal to Supreme Court United States. Filed May 23, 1904. F. D. Monckton, clerk.

Endorsed on cover: File No. 19,419. U. S. C. C. of appeals, 9th circuit. Term No. 319. Mary McCune, by Daniel Donahue her guardian, *ad litem*, appellant, *vs.* N. Fred Essig & Emma C. Essig, his wife. Filed July 18th, 1904. File No. 19,419.

7—319

FILE COPY.

FILED
JAN 26 1905

Supreme Court of the United States

OCTOBER TERM 1904.

No. 210 (01).

MARY McCUNE, by DANIEL DONAHUE,
her guardian ad litem,
Appellant

vs.

N. FRED ESSIG and EMMA C. ESSIG, his wife,
Appellees.

BRIEF FOR APPELLANT

W. E. GUILLAN,
Solicitor for Appellant.

Supreme Court of the United States

OCTOBER TERM 1904

No. 319

MARY MCCUNE, BY DANIEL DONAHUE, *her Guardian ad litem*, *Appellant*,

vs.

N. FRED ESSIG AND EMMA C. ESSIG, his wife, *Appellees.*

Brief for Appellant

UPON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

STATEMENT.

This action was instituted in the Superior Court of the state of Washington. All the parties are residents of said state. The real estate involved is situate in the county of Lincoln, in the state of Washington. The action was commenced in the Superior Court of said state, in and for said Lincoln county. Before the commencement of the action, said court, upon a petition showing appellant to be a minor (Tr., pp. 2 and 3), appointed Daniel Donahue guardian ad litem for appellant, and authorized said guardian

ad litem to institute and prosecute this action for appellant. (Tr., pp. 3 and 4.)

After the complaint was filed and process served upon appellees, a stipulation was entered into permitting an amended complaint to be filed, and allowing appellees twenty days after the filing of said amended complaint within which to appear. (Tr., p. 5.)

The material facts alleged in said amended bill or complaint, which was served and filed pursuant to said stipulation, are as follows, to-wit:

That appellant is a minor and the only child of William McCune, now deceased, and Sarah Donahue (nee McCune). That prior to the 4th day of April, 1884, and while said William McCune and Sarah Donahue (nee McCune) were husband and wife and living together, they entered upon and took possession of the lands involved in this controversy, which said lands were a part of the public domain, and subject to entry under the homestead laws of the United States. Upon said 4th day of April, 1884, said William McCune filed in the United States Land Office at Spokane Falls his notice of entry and possession, and his application to take said lands as a homestead under said United States homestead laws. That thereafter and during the year 1884, said William McCune died, leaving as his only heirs his said wife and this appellant. That subsequent to said entry and filing upon said lands said William McCune, together with his said wife and daughter, continued to reside upon said lands until his death; and that thereafter said widow and daughter continued to reside upon said land until the 17th day of December, 1889, when said widow made final proof under

said entry and application so made by said William McCune. That on the 6th day of March, 1891, the United States issued a patent for said land to "Sarah Donahue, formerly the widow of William McCune, deceased." That said Sarah Donahue (nee McCune) conveyed said land in about 1892 to appellees for value. That appellees have had possession of said lands and have appropriated the rents and profits to their own use ever since 1892, and claim to be the owners thereof. That appellant is the owner of one-half of said lands, and entitled to a share of the rents and profits. And prays for judgment quieting title and for partition and for an accounting, etc. (Tr., pp. 5 to 10.)

The state court ordered said cause removed to the United States upon appellees' petition for removal.

Appellant moved to remand to the state court (Tr., pp. 15 and 16), and her motion was denied and exception allowed. (Tr., p. 16.) Appellees withdrew their demurrer, filed in the state court, and filed a demurrer to amended complaint. (Tr., pp. 17 and 18.)

The demurrer was sustained, and a decree entered dismissing the action, etc. (Tr., pp. 18 and 19.)

Upon appeal the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment and decree of the Circuit Court. (Tr., p. 44.)

From the decree of said Circuit Court of Appeals this appeal is prosecuted.

The issues involved in this controversy were presented to the Circuit Court and to the Circuit Court of Appeals, and are now presented to this court, upon

the motion to remand to the state court and the demurrer to the bill.

ASSIGNMENT OF ERRORS.

I.

The United States Circuit Court of Appeals erred in affirming the decree of the Circuit Court denying complainant's motion to remand this cause to the Superior Court of the state of Washington, in and for the county of Lincoln.

II.

Said court erred in failing and declining to hold that the determination of this action did not involve the construction of the constitution or any treaty or law of the United States.

III.

Said court erred in refusing to hold that this action was to be determined under and by the laws of the state of Washington.

IV.

Said court erred in failing and declining to hold that this court had held and decided that the patent described in the complaint herein did not relate back and take effect as of the time when the title was initiated.

V.

Said court erred in refusing to hold that the title to real estate, having passed according to the laws of the United States, and the United States not being a party, and the validity of the patent not being attacked, like all other property within the state, is subject to state legislation, and that the beneficial in-

terests in and to said property are to be determined by the courts of the state of Washington under the provisions of the legislature of said state, provided, however, that said legislation is consistent with the admission that the title passed and vested according to the laws of the United States.

VI.

Said court erred in affirming the order and decree of the Circuit Court, sustaining the demurrer to the bill of complaint herein.

ARGUMENT.

The questions involved in this appeal are of unusual importance to all of the people of the state of Washington, and of all of the newer states where lands have been conveyed by the United States to settlers. Analogous questions are arising daily in numerous cases and as to thousands of acres of land which have passed from the United States in recent years. If this court has jurisdiction of this case, then it must determine all cases where the United States was the grantor, and a controversy arises as to beneficial interests.

It has not been the policy of this court to determine questions involving the beneficial or equitable title to real estate, although the title had been acquired from the United States.

This court in the case of *Blackburn v. Portland Gold Mining Co.*, 175 U. S., 571, through Mr. Justice Shiras, said:

"This court has frequently been vainly asked to hold that controversies in respect to lands, one of the parties to which had derived his title directly under an act of congress, for that reason alone presented a federal question."

The laws of Washington Territory, in force in 1884 and ever since and now in force in the state of Washington, provide that all property acquired during coverture by either husband or wife, other than by "gift, devise or inheritance," shall be community property, and to dispose of or incumber community real estate the husband and wife must join in the execution of a "deed or other instrument of conveyance," and upon the death of either, having surviving children, if no testamentary disposition has been made of any part of the community property one-half thereof descends to the survivor and the other half to the children, and that the community character of the title is fixed from the time the title is initiated.

The following sections of 1 Ballinger's Codes and Statutes of Washington provide:

Sec. 4488. "Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterwards by gift, bequests, devise or descent, with the rents, issues and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber or devise, by will, such property without the wife joining in such management, alienation or incumbrance, as fully and to the same effect as though he were unmarried."

Sec. 4489. "The property and pecuniary rights of every married woman at the time of her marriage, or afterwards acquired by gift, devise or inheritance, with the rents, issues and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property, to the same extent and in the same manner that her husband can property belonging to him."

Sec. 4490. "Property, not acquired or owned as prescribed in the next two preceding sections, acquir-

ed after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof."

Sec. 4621. "Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her, or their bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall all pass to the survivor, to the exclusion of collateral heirs, subject to the community debts, the family allowance, and the charges and expenses of administration."

The Supreme Court of the state of Washington, in the case of *Forker v. Henry*, 21 Wash., 235, 240, said:

"It would seem that, under the homestead laws, residence and improvement are required as conditions precedent to the grant of the title. It is evident that equities attach upon such settlement and improvement which entitle the settler to the continued possession and ultimate title. A consideration of the authorities from those states in which the community property law exists seems to establish the principle, 'If either spouse before the marriage has acquired an equitable right to property, which is perfected after marriage, the property is separate.' There is perhaps considerable uncertainty as to a uniform rule concerning the right of the community to reimbursement out of the separate estate of the spouses benefited, for expenditures of money and

time and effort in performing conditions and perfecting and completing the title. But the rule also seems to prevail in favor of the community as to title initiated during the community and perfected after the dissolution of the marriage. In the first case, the title takes effect as of the time before the community, and the property is therefore separate; and in the other as of a time during the community, and is therefore community property."

The case of *Forker v. Henry* was subsequently approved in *Ahern v. Ahern*, 31 Wash., 334.

Appellant contends (1) that the equitable right to possession and ultimate title to the real estate involved was a community interest from its inception; (2) that appellant as the issue of said community was privy to said community interest; (3) that that community interest has ripened into a full and complete title so that by the doctrine of relation the real estate has been subject to state legislation from the date of the initiation of said title; (4) that the patent was issued to the only person to whom it could issue under the laws of the United States; (5) that, the United States not being a party to this action, and the title to said real estate having passed and vested according to the laws of the United States by patent, and the validity of that patent not being questioned, this controversy as to the beneficial interest of appellant by virtue of the state law, must be determined by the state court.

The allegation that the construction of the United States laws, which are referred to in the petition, is involved in the determination of this case, is a mere conclusion. There is no fact alleged which shows that any particular part or portion of these laws must be construed in the determinination of this case. It is clearly manifest that these laws were complied with

and the patent issued to the only person to whom it could have issued. The essential facts necessary to change the jurisdiction are not contained in the petition.

Gold Washing & Water Co. v. Keyes, 96 U. S., 199.

It is admitted by all parties, and is a fact beyond doubt, that the widow took the legal title under and by virtue of the patent. The patent operated as a release to the widow of all the interest of the United States in the land. Whether the widow took the beneficial interest as well as the legal title depends upon the effect to be given the acts of the legislature of the state, and not upon the acts of congress.

Romie et al. v. Casanova, 91 U. S., 379.
McStay et al v. Friedman, 92 U. S., 723.
Hoadley v. San Francisco, 94 U. S., 4.
Blue Bird Min. Co. v. Largey, 49 Fed., 289.
Blackburn v. Portland Gold Min. Co., 175 U. S., 571.
Shoshone Mining Co. v. Rutter et al, 177 U. S., 505.

In the case of *Blue Bird Mining Co. v. Largey, supra*, the court, at page 291, says:

"There cannot be much dispute but that, when the United States has parted with its title to land, any dispute concerning the same which does not draw in question the validity of the grant by which the title was conveyed, presents no federal question."

In the case of *Hoadley v. San Francisco, supra*, Chief Justice Waite, speaking for the court, page 5, says:

"The questions involved did not arise under the

laws of the United States, but under the ordinances of the city as ratified by the act of the legislature. The act of congress operated as a release to the city of all the interests of the United States in the land. The title of the United States was vested in the city. Whether the city took the beneficial interest in the property as well as the legal title depended upon the effect to be given to the act of the legislature and the ordinances, and not upon the act of congress."

In *Romie et al v. Casanova, supra,* this court, speaking through Mr. Chief Justice Waite, says:

"No federal question is presented by the record in this case. The action was brought to recover the possession of certain lands. Both parties claimed title from the city of San Jose; and the question to be determined was, which of the two had actually obtained a grant of the particular premises in controversy. The title of the city was not drawn in question. Even if it depended upon the treaty of Guadaloupe Hidalgo and the several acts of congress to ascertain and settle private land claims in California, the case would not be different. Both parties admit that title, and their litigation extends only to the determination of the rights which they have severally acquired under it."

In *Shoshone Mining Company v. Rutter and Bradley, supra,* Mr. Justice Brewer delivering the opinion, this court says:

"We pointed out in the former opinion that it was well settled that a suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the constitution or laws of the United States, within the meaning of the jurisdiction clauses; for if it did, every action to establish title to real estate (at least in the newer states) would be such a one, as all titles in those states come from the United States or by virtue of its laws."

The Supreme Court, in the case of *Wilcox v. Jackson,* 13 Peters, 517, says:

"We hold the true principle to be this, that whenever the question in any court, state or federal, is, whether a title to land, which had once been the property of the United States, has passed, that question must be resolved by the laws of the United States; but that, whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to state legislation, so far as that legislation is consistent with the admission, that the title passed and vested according to the laws of the United States."

The District Judge, in discussing that case, in his opinion in this case, says:

"Under this rule, to bar the jurisdiction of the United States Circuit Court, it is necessary for the complainant to admit not only that the title of the United States has been conveyed, but also that the title 'vested according to the laws of the United States' and it is impossible to keep questions of federal law out of the case, without a plain admission that the patent conveyed the title to the patentee, absolutely."

If this contention is correct, then there can be no such thing as community property or dower right. The patentee in every case would take the "absolute" title. The laws of the different states would be abrogated, and held for naught. The United States Court would have to determine the beneficial interest in all cases where the title emanated from the government.

Suppose a case: If William McCune had lived, and the patent had issued to him, and he had conveyed the land by deed, in which his wife did not join; his wife had instituted an action to set aside that deed, would that present a federal question? Would this court hold that William McCune took

the "absolute" title, and that the right of the wife must be determined by the United States Court?

There is nothing inconsistent with the admission that these lands passed and vested according to the laws of the United States and the proposition that after the title so passed and vested it became subject to the community and other property laws of the state.

It is well settled by the decisions of this court that after any part of the public domain has been entered by a homesteader, and notice of such entry has been properly filed in the proper land office, such land so entered becomes segregated from the public domain, and such settler has a vested right therein against everybody, and the government as well, and when the patent for such land is issued it relates back and takes effect as of the time of such entry.

1st Supp. R. S. U. S., p. 282.
Shepley et al v. Cowan et al, 91 U. S., 330 (337).
Sturr v. Beck, 133 U. S., 541 (550).
Nor. Pac. Ry. Co. v. McCormick, 89 Fed. 659 (662-3).
Witherspoon v. Duncan, 4 Wall., 210 (218).
Bardon v. N. Pac. R. Co., 145 U. S., 535.
Sturr v. Beck, 133 U. S., 541 (548).
Hastings & Dak. R. R. Co. v. Whitney, 132 U. S., 357 (361).
U. S. v. Turner, 54 Fed. 228-229.
Burlington K. & S. W. P. Co. v. Johnson, 16 Pac. Reporter, 125-129.

In case of *Shepley et al v. Cowan*, 91 U. S., 330 (337), this court holds that a patent for a preemption relates back and takes effect from time of settle-

ment; Section 3 of the act of May 14th, 1880 (21 Stat., 140), provides that patents for homesteads shall relate back to the date of settlement the same as in preemption.

Sturr v. Beck, 133 U. S., 541 (550).

Again, in the case of *Gibson v. Choteau*, 13 Wall, 92, at page 101, this court says:

"Thus, in the present case, the patent, which was issued in 1862, is said to take effect by relation at the time when the survey and plat of the location, made in 1818, were returned to the recorder of land titles under the act of congress. At that time the title of the claimant to the land desired by him had its inception, and so far as it is necessary to protect his rights to the land, and the rights of parties deriving their interests from him, the patent is held to take effect by relation as of that date."

Thus it is well settled that the patent relates back and takes effect as of the time of the entry. That question having been settled by this court, it no longer presents a federal question.

State of Kansas ex rel., etc. v. Bradley, 26 Fed., 289.

Blue Bird Min. Co. v. Largey, supra.

When William McCune entered this land he had not the legal title, but he had an immediate equitable interest and the exclusive right of possession until forfeited by failure to carry out the terms of his entry.

United States v. Turner, 54 Fed., 228.

The terms of his entry were carried out. The patent issued by reason of his entry. The state legislature had the right to direct to whom that equitable right and interest should pass. If the rights and interests under that entry had been forfeited, the state

law would have no effect upon the title to the land. That equitable interest ripened, and was confirmed by the patent.

If William McCune had made a contract for the purchase of this land with an individual, in which contract all of the conditions and requirements of the homestead laws of the United States had been the conditions and had entered into possession of the land, and had died, as in this case, and the deed had gone to his widow, this court could not retain the case.

The rule cannot be different simply because the United States is a party to the contract. There is no question but that the United States has carried out its contract fully and to the letter.

THE DECISION IN BERNIER V. BERNIER.

The laws, the construction of which appellees claim are involved in this case, simply provide the manner in which a patent may be obtained.

This court, in the case of *Bernier v. Bernier*, 147 U. S., 242, says:

"The object of the sections in question was, as well observed by counsel, to provide the method of completing the homestead claim, and obtaining a patent therefor, and not to establish a line of descent or rules of distribution of the deceased entry man's estate. They point out the conditions on which the homestead claim may be perfected and a patent obtained, and these conditions differ with the different positions in which the family of the deceased entry man is left upon his death."

The entry man enters into possession of the lands, and expends all of his time, energy and money in improvements. If the rule that the United States Court has jurisdiction, and that the title goes to his widow,

"absolutely," upon his death, and that the state law does not apply, then the children are prohibited from taking the interest of their father under the state law. A rule of descent and distribution would, therefore, be made by the United States Court, abrogating the state law and contrary to the rule announced in the case of *Bernier v. Bernier, supra.*

The Circuit Court of Appeals, in its opinion in the case at bar, lays stress upon the fact that this court entertained jurisdiction in the cases of *Bernier v. Bernier, supra,* and *Hutchinson Investment Company v. Caldwell,* 152 U. S., 65. The questions involved in those cases, however, were entirely dissimilar to the one now demanding the attention of this court. In both those cases this court very properly assumed jurisdiction and could not have done otherwise. *Bernier v. Bernier* was a suit in equity to determine the respective rights of the adult and minor heirs of Edward Bernier under the laws of the United States. The complainants (who were the adults) contended that under section 2291 of the Revised Statutes of the United States, the homestead should pass to all the ten children, both adults and minors; the defendants (who were the minors) contended that by virtue of section 2292 of the Revised Statutes of the United States, the homestead should pass to the minors alone to the exclusion of the adults. No right was contended for by any of the parties by virtue of a state law. The patent was attacked as having been issued improperly the wrong persons. In the case at bar the patent was properly issued and no question is raised thereon.

This court held that the above sections should be construed together. That section 2292 did not repeal section 2291. That under and by virtue of those

sections (and without regard to any state law) the patent should have been issued to all the children, both adults and minors.

The Circuit Court of Appeals, referring to the decision in Bernier v. Bernier, says:

"The court in that case recognized the right of all the surviving children of the entryman to share equally in the homestead, but so held, not out of consideration of a state statute of descent, but on account of the meaning of the two sections so quoted from the homestead law. In other words, the court applied and gave force only to the homestead law as it was expressed, and very correctly observed that it was not the purpose of the homestead law to establish a line of descent or rule of distribution, but it was to determine who were the grantees of the government and who were entitled to receive the patent therefor."

It is conceded that this statement and construction of what was held in that case is entirely correct. No contention has been, or is now, made in conflict with that statement. There was no question of a state statute in that case nor could there have been one. The question was as to who should receive the patent. There is no such controversy here. It has been, and is now, admitted that the title to the real estate in the case at bar passed and vested according to the laws of the United States by patent. A beneficial interest by virtue of the state law is the sole question here.

In the case of *Hutchinson Investment Co. v. Caldwell, supra,* the question was as to the meaning of the word "heirs" as used in section 2269 of the Revised Statutes of the United States which provides for the issuance of a patent to the heirs of a deceased preemptor and it was held that those were heirs who might be such according to the *lex rei sitae,* by which

generally speaking, the question of the descent and heirship of real estate is exclusively governed.

The patent to the land in the case at bar was issued to the widow after she had married a second husband. Suppose this second husband would claim that the land was community property, and bring an action in the state court to recover his interest. Would that case present a federal question? That would be a controversy as to a beneficial interest, the same as this. If one patentee takes the title "absolute," to the exclusion of equitable and beneficial interests, then every patentee does the same. There can be no discrimination.

II.

ON THE DEMURRER.

If the Federal Court Could, Under Any Possible View, Have Jurisdiction to Retain This Case, Then It Was Error to Sustain the Demurrer and Dismiss the Bill of Complaint.

It has already been pointed out that, by the doctrine of relation, this court has held that a patent for a preemption takes effect from the time of settlement, and that section 3 of the act of May 14th, 1880 (21 Stat. at large, 140), provides that patents for homesteads shall relate back to the settlement the same as in preemption.

Shepley et al v. Cowan, 91 U. S., 330.
Sturr v. Beck, 133 U. S., 541, 550.
Gibson v. Choteau, 13 Wall., 92.

The District Judge, for the purpose of avoiding the doctrine of relation, as laid down in the case of *Shepley v. Cowan,* 91 U. S., 330, says in his opinion, at pp. 32 and 33 of Transcript:

"The opinion in *Shepley v. Cowan* was written by Mr. Justice Field, and the doctrine of relation, to which reference is made, will be better understood by referring to the explanation of the doctrine which the same learned justice had previously given in the opinion of the Supreme Court in the case of *Gibson v. Choteau*, 13 Wall., 100, as follows: 'By the doctrine of relation is meant that principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as conveyance or deed. The last proceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first proceeding was had. Thus, in the present case, the patent, which was issued in 1862, is said to take effect by relation at that time when the survey and plat of the location, made in 1818, were returned to the recorder of land titles under the act of congress. At that time the title of the claimant to the land desired by him had its inception, and so far as it is necessary to protect his rights to the land, and the rights of the parties deriving their interests from him, the patent is held to take effect by relation as of that date.

" 'The Supreme Court of Missouri, considering that by this doctrine of relation, the legal title, when it passed out of the United States by the patent, instantly dropped back in time to the location of the first act or inception of the conveyance, and vested the title in the owner of the equity as of that date, held that the statute intercepted the title as it passed through the intermediate conveyances from that period to the patentee. 'The legal title,' said the court, 'in making this circuit, necessarily runs around the period of the statute bar, and the action founded upon this new right is met by the statute on its way, and cut off with that which existed before.

" 'The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purpose of justice, and is only applied for the secu-

rity and protection of persons who stand in some privity with the party that initiated proceedings for the land, and acquired the equitable claim or right to the title.' "

"This court would commit much more transparent error than the one pointed out in the decision of the Supreme Court of Missouri by granting a decree in favor of the complainant upon the theory that by this doctrine of relation the legal title to the land in controversy when it passed out of the United States by the patent to Mrs. Donahue, instantly dropped back in time to the inception of her deceased husband's claim, and that the community property law of this state intercepted the title as it passed from the United states to the patentee, and operating in combination with the doctrine of relation, created a vested estate in a dead man."

We are unable to agree with the learned Judge's construction of the case of *Gibson v. Choteau, supra.*

It is expressly held in that case that "*so far as it is necessary to protect his rights to the land,* AND THE RIGHTS OF THE PARTIES DERIVING THEIR INTERESTS FROM HIM, *the patent is held to take effect by relation as of that date.*"

Mr. Justice Field in that case holds that the doctrine does not apply for the benefit of the defendants, for the reason that they are strangers to the equitable right initiated, and says:

"The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purpose of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land, and acquired the equitable claim or right to the title. The defendants in this case were strangers to that party and to his equitable claim, or equitable title, as it is termed, not connecting themselves with it in any

valid transfer from the original or any subsequent holder. The statute of limitations of Missouri did not operate to convey that claim or equitable title to them. It not only extinguished the right to maintain the action of ejectment founded hereon, under the practice of the state. It left the right of entry upon the legal title subsequently acquired by the patent wholly unaffected."

In the case at bar it cannot be contended that this infant daughter was not privy to the equitable right or claim of her father.

It is probable that the learned District Judge overlooked the fact that in that case, the party seeking to invoke the doctrine was a stranger to the equitable right. The first two or three lines of the opinion in that case, following the part quoted by the learned District Judge, renders that case inapplicable to the case at bar, in so far as it might withhold the doctrine of relation.

Again, as said in that case, this doctrine is "adopted by the court solely for the purpose of justice" and is for the benefit of privies. Would it not be a just purpose to protect the infant orphan?

It is not contended that the estate vested in a dead man. It is contended, however, that the title, when it passed out of the United States by the patent, instantly dropped back in time to the inception or initiation of the equitable right of William McCune and that the laws of the state intercepted and prevented the widow from conveying a complete title without first complying with the probate laws of said state.

The Circuit Court of Appeals, referring to the cases of *Shepley v. Cowan and Gibson v. Choteau, supra,* upon the doctrine of relation, says:

"Of what avail would it be to the appellant in this case to invoke that doctrine and to assert that the pat-

ent issued to the widow McCune took effect by relation at the time when the settlement was made by him? Conceding that it relates back to and takes effect at that date, it can nevertheless detract nothing from the effect of the widow's title. Her title, as well, relates back to the initiatory act, and for her benefit only and not for the benefit of the heirs of the deceased entryman."

If this is true, then, as has already been said, there can be no such thing as community property in land acquired by patent and the patentee can convey without the wife, or husband, as the case may be, joining in the conveyance as required by the laws of the state of Washington.

THE DECISIONS OF THE STATE COURT.

In the opinion of the Circuit Court of Appeals, Gilbert, J., said:

"The Supreme Court of Washington has never applied the doctrine of relation to a case such as that which is now under consideration, nor has that court held the land acquired under the homestead laws of the United States to be community property in any case where the husband and wife resided thereon for a shorter time than the period required by those laws in order to acquire title." (Tr., p. 43.)

And this statement is followed by a discussion of *Kromer v. Friday*, 10 Wash., 621, and *Bolton v. La Camas Water Co.*, 10 Wash., 246, and *Ahern v. Ahern*, 31 Wash., 334. The first two of these cases, so far as they bear upon the question involved here, have been impliedly overruled by the case of *Forker v. Henry, supra.* We do not rely upon them. These case were not cited in Appellant's brief in the Circuit Court of Appeals.

In the case of *Forker v. Henry, supra*, the homestead entry was made by an unmarried woman. She

resided on the land four years and then married. Together with her husband she continued to reside upon the land the requisite time and made final proof and obtained a patent. The court held the lands to be her sole and separate property as against the claim of the community. This case was subsequently cited and approved in the case of *Ahern v. Ahern, supra.* In the former case, *Forker v. Henry,* the entryman had resided on the land for a shorter time than the period required by the United States laws in order to acquire title.

Suppose that at the identical time when Mrs. Forker entered upon her homestead, a married man had entered the adjoining homestead; that after residing thereon for four years his wife died, leaving children, and the surviving husband continued to reside on the land the requisite time and procure a patent. If the rule of the state prevails, then, and in that event, the land so acquired would be community property, one-half to the children and one-half to the husband. In the other event, if the Federal Court has jurisdiction and the rule announced in the two former opinions in this case should prevail, the husband would take the "absolute" title to the exclusion of the children. The conveyance of the husband alone would be sufficient to pass good title. The laws and rules of property rights of the state would be thereby abrogated and held for naught. Every title, and the beneficial interest therein, emanating from the United States would have to be adjudicated by the United States Courts. It is our contention that neither congress nor this court ever intended to take from the states the right to control all beneficial interests and lines of descent.

A LOCAL RULE OF PROPERTY INVOLVED.

Assuming the jurisdiction of this court to exist, then it is submitted that it will be bound by the rule laid down by the Supreme Court of the state of Washington in the cases of *Forker v. Henry, supra,* and *Ahern v. Ahern, supra,* as determinative of a settled rule of property in the state of Washington, that when the title is initiated during the community and perfected after dissolution the property is community.

The settled rules of real property, as established by state courts, are conclusive upon this court.

Lowndes v. Huntington, 153 U. S., 1; 14 Sup. Ct. Rep., 758.

The states have the power to regulate the tenure of real property and the rules of its transfer and descent.

United States v. Fox, 94 U. S., 315.
Arndt v. Griggs, 134 U. S., 321.
Hutchinson Investment Co. v. Caldwell, 152 U. S., 65.

In *Arndt v. Griggs, supra,* this court says:

"The well being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions concerning it. The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the state; and as this duty is one of the state, the manner of discharging it must be determined by the state, and no proceeding which it provides can be declared invalid, unless it conflict with some special inhibitions of the constitution or against natural justice."

In *United States v. Fox, supra,* at p. 320, this court again says:

"The power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated."

Neither the laws of the state of Washington nor the decisions of its Supreme Court, construing those laws, are in conflict with any part of the homestead law which provides simply the manner of procuring, and to whom the patent shall issue. It is admitted that the laws of congress have been complied with and that the patent to the premises in question issued to the party duly entitled to receive it. While it is now contended that the matter is one entirely of state jurisdiction yet, if this court assumes jurisdiction, it must be governed by the settled rule of real property as laid down by the state Supreme Court and it is submitted that the question here involved is squarely within the principles announced by this court in the decisions to which reference has already been made.

THE CASE OF HALL V. RUSSELL.

In both the District Court and the Circuit Court of Appeals, it was held that the decision of this court in *Hall v. Russell*, 101 U. S., 503, is controlling in the case at bar. It is submitted, however, that that decision is distinguishable, and not decisive of the question involved here.

The learned District Judge, in his opinion, referring to the case of *Hall v. Russell*, says:

"The provisions of the homestead law are similar to the Oregon Donation law, and the policy of the government is identical in both statutes, and it is my opinion that the decision of this case must be controlled by the case of Hall v. Russell, 101 U. S., 503-514, in which the Supreme Court construed the provisions of the donation law, and held it made no grant of land to a settler until the completion of his residence and cultivation of the land for the prescribed period; that down to that time he was an authorized settler but not a grantee; that upon his death prior to the expiration of that period, his rights, but not the land, descended to his heirs; that upon making the required proof the heirs became entitled to a patent conveying the title to them as donees of the government, but that the title was not by inheritance from the deceased but by grant directly from the United States, and that a statute enacted by the legislature of Oregon Terirtory, providing that a settler's claim might descend to his heirs as real estate, and that his possessory right might be disposed of by will, conflicts with the act of congress and that the territorial government could not add to, nor take from, the grant." (Tr., p. 36.)

The Circuit Court of Appeals, per Gilbert, J., says:

"The case of *Hall v. Russell*, 101 U. S., 503, is, we think, directly in point. That was a case which involved the construction of the donation act, an act in which the terms of the grant are much stronger than in the case of the homestead law, the language thereof being: 'There shall be, and hereby is, granted,' the grantee being any qualified settler or occupant of the public lands, 'who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act.' It further provided that if a settler died before the expiration of the required four years of continued possession, all his rights should descend to his heirs at law, including his widow. The court held that until such settler was qualified to take, there was

no actual grant of the land and that if such settler should die after a residence thereon of less than the required four years, he had no devisable interest therein." (Tr., p. 42.)

The Oregon Donation Act and the Homestead Law are entirely dissimilar upon the question here involved. By section 8 of the Donation Act (9 U. S. Stat. at Large) it is provided:

"That upon the death of any settler before the expiration of the four years' continued possession required by this Act, all the rights of the deceased under this Act shall descend to the heirs at law of such settler, including the widow, when one is left, in equal parts; and proof of compliance with the conditions of this Act up to the time of the death of such settlers shall be sufficient to entitle them to the patent."

The United States has no general laws of succession. The special provision of the Oregon Donation Act fixes absolutely to whom "the rights" shall descend. As held in *Bernier v. Bernier, supra*, the homestead law provides simply the manner of procuring, and to whom the patent shall issue and is not intended to fix a line of descent.

Not only was the decision in *Hall v. Russell* upon a question involving the construction of an act dissimilar to the homestead law, but the question decided was not similar.

The point decided in that case was simply this: That no title to the soil vested in the settler under the Oregon Donation Act until all the conditions of residence and cultivation precedent to the issuing of a patent had been fully performed, and that until compliance with such conditions precedent the settler had no devisable interest in the land. Appellant admits that under the Homestead Law William McCune

did not, at the time of his death, have a devisable interest in the property involved in the case at bar. The contentions of appellant heretofore set forth need no repetition to impress this court with the dissimilarity of the question arising in *Hall v. Russell* and in the case at bar.

The attention of the court is called to the case of *Vance v. Burbank*, 101 U. S., 514, in support of the contention that the decision in *Hall v. Russell* is not controlling in the present case. In that case one Scott settled upon land in Oregon under the laws of the provisional government. About two years later the Oregon Donation Act was passed, and at that time Scott was living with his wife upon the land and had all the qualifications of a "settler." Previous to compliance with the condition of four years' residence and cultivation of the land, the wife died, leaving three children. In proceedings before the Land Department Scott was defeated in his claim for a patent by reason of a decision of the Land Department to the effect that he had not complied with the requisite condition precedent as to residence and cultivation. Then the children began a suit in equity asserting their ownership of the lands and this court held that a wife or her heirs got nothing under the Donation Act before her husband or someone for him proved up the claim, and that the decision of the Land Department to the effect that the husband had failed to comply with the conditions precedent to patent was conclusive upon the court.

This court, through Mr. Chief Justice Waite, who also delivered the opinion in *Hall v. Russell, supra*, said:

"This brings us to inquire as to the rights of the children and the heirs of the deceased wife. In *Hall*

v. Russell (*supra*, p. 503), we held that a grant to a settler did not take effect as against the United States, so as to pass anything more than a possessory right in the lands occupied, until the completion of the four years' residence and cultivation, and a full compliance with all the other conditions of the act. The statutory grant was to the settler; but if he was married the donation, when perfected, inured to the benefit of himself and his wife in equal parts. The wife could not be a settler. She got nothing except through her husband. If he abandoned the possession before he became entitled to the grant, her estate in the land was gone as well as his. *In the view we take of the case, it is unnecessary to decide when a settlement became perfected so as to establish a claim, or whether, if the wife died before the end of the four years', her heirs would be entitled to her half when the grant was completed.*" (101 U. S., at p. 521.)

It is at once apparent that the question in the case at bar was not decided in *Hall v. Russell, supra.*

Furthermore, it seems to be, and to have ever been, the policy of the government that the heirs should succeed to the rights of the deceased settler.

The District Judge, in his opinion at page 36 of the Transcript, supposes a case wherein the heirs are aliens and suggests that the title would pass to aliens contrary to the intention of congress. In that case it can be as well supposed that a part of the children are American citizens and a part are aliens, in which case the citizens could not be made to suffer because part of the heirs are aliens.

We respectfully submit that upon the errors assigned and the authorities cited that a reversal is inevitable. That this case must be remanded to the state court from whence it came. And that if this

court can possibly hold that it has jurisdiction, then, the demurrer must be overruled.

Respectfully submitted,

W. E. CULLEN,
Solicitor for Appellant.

IN THE

Supreme Court of the United States.

October Term, 1904.

MARY MCCUNE, by DANIEL DONAHUE, her guardian ad litem, *Appellant*,
vs.
N. FRED. ESSIG and EMMA C. ESSIG, his wife, *Appellees.*

No. 319.

BRIEF FOR APPELLEES.

I.

On the Merits.

Ordinarily, when the question of jurisdiction is raised, it should be discussed before any other is considered. We shall depart from the rule in this case, because a discussion of the merits will go far toward establishing that a determination of the appellant's claim can only be had by construing laws of the United Sates, whereby the claim that the Federal courts have not jurisdiction of the controversy will have been answered.

The appellant's amended bill of complaint, upon which the cause was removed into the Federal courts, sets forth that William McCune and Sarah McCune were husband and wife, and that the appellant is their only child; that William McCune, after marriage, entered upon public

lands of the United States, with intent to acquire title thereto under the homestead laws of the United States; that he died intestate within less than a year thereafter, leaving the appellant and his widow as his sole heirs; that they continued to reside upon the land continuously for five years thereafter, and the widow then made final proof of right to the lands, receiving a patent in her name alone, in her right as widow of William McCune; that she subsequently conveyed the lands to appellees. Upon these facts appellant asserts that she is the owner of an undivided one-half interest in the lands, and prays that her title be quieted, that an accounting of rents and profits be had, and for other appropriate relief.

The claim so made is based upon the community property laws and statutes of descent of the State of Washington. 1 *Ballinger's Code*, §§ 4488-90, 4621. These provide that property acquired after marriage in any other manner than by gift, bequest, devise, or descent, shall be the property of the community composed of husband and wife, and that upon the death of either spouse, intestate, the community property shall descend one-half to the surviving spouse, and one-half to the child or children of the deceased spouse. Therefore the appellant's theory is, necessarily, that the right of a settler upon the public lands, before he has complied with the requirements of the statute as a requisite to the passing of title, is a right in the land, which is amenable to the laws of the state where the land is situated to the same extent that any other property within its boundaries is.

This, we say, is necessarily her theory. Title is an essential attribute of property. The legal title may be in one, the beneficial interest in another, but whenever property comes into existence its title must vest *eo instanti*, in some one. So, too, all property is subject to the laws of some sovereignty, and those laws will govern in those incidents which give rise to the existence of property, *e. g.*, its alienability, voluntary or involuntary, its devisabilty, descendibility, and the like. Therefore, when the appellant says that she has an interest in the lands in dispute because her father was a settler thereon at the time of his death, she necessarily asserts that his right as an entryman was a property right which would descend to her by virtue of the laws of the state, there being no Federal statute of descent.

This premise admitted, it follows in logical sequence that whatever right she has initiated at the moment of her father's death. If his right in the public lands was property, his title to it ceased with his death. The title must then have gone to some one. It could not remain suspended, waiting the passage of time or the happening of future events to determine its descent. If it was a mere personal right, it died with him; if it was property to which a title would pass, it must have then gone to some existing being.

The homestead laws of the United States (§§ 2289-92, *Rev. Stat.*), under which William McCune entered the lands in dispute, grant to the settler who enters public lands thereunder the right to take possession of the lands, and provide that when he shall have resided upon

or cultivated the lands for five years, or, in case of his death, his widow, or in case of her death, his heirs, shall have done so, he, she, or they may make proof thereof, and will then be entitled to a patent therefor. Prior to patent, or, at least, prior to a full compliance with the conditions which entitle him to a patent, the settler has no more than a right of possession and a right to be preferred in the purchase of the lands. As against the United States, the owner of the lands, he acquires no vested right until he has fully complied with the requirements of the act, and Congress may at any time vest title in another.

Shiver v. United States, 159 U. S. Rep., 491.
Campbell v. Wade, 132 U. S. Rep., 34.
Wagstaff v. Collins, 97 Fed. Rep., 3.
Frisbie v. Whitney, 9 Wall., 187.
Shepley v. Cowan, 91 U. S. Rep., 330.
Gonzales v. French, 164 U. S. Rep., 338, 345.

No doubt this right is, in a sense, a property right. But it is held at the will of Congress; it may be forfeited for non-compliance with existing laws, or taken away by changes in those laws. It does not, therefore, become subject to state regulation only in so far as Congress permits.

Anderson v. Carkins, 135 U. S. Rep., 483.
Hall v. Russell, 101 U. S. Rep., 503, 513-14.

Congress, having the undoubted right to do so, has provided by § 2291 of the Revised Statutes that in case of the death of a settler upon the public lands under

the homestead laws, his widow, or in case of her death, his heirs, may continue and complete the required period of residence or cultivation, and obtain title to the lands. This is in no sense a statute providing for the descent of property. The right which the settler has is not a vested right. He has obtained no title, and can obtain none until he has done everything required of him. It is, of course, competent for Congress to say who will be accepted as a purchaser of the public lands. Therefore, when a settler upon public lands under the homestead laws dies before he has become the purchaser of the lands, *i. e.*, before he has done those things which entitle him to the lands, his right to purchase, being purely a personal right, dies with him. Those whom Congress recognizes as entitled to complete the performance of the conditions, do so, not as successors in interest from the deceased settler, but as grantees, or rather donees, of the United States.

In *Hall v. Russell*, 101 U. S. Rep., 503, this court was called upon to decide whether the right acquired by a settler upon public lands under the Oregon Donation Act (9 Stat., 946), prior to the period of residence requisite to the obtaining a patent, was devisable. It was held the right was not devisable, and in so holding the court declared: (1) that the rights of the settler and those who claimed through him must be determined by the provisions of the act, and if it did not confer a devisable estate upon him he had none; (2) that there was no grant of the soil until the settler had completed the four years of residence required by the act in order to

obtain a patent, and until that time he had nothing but a mere right of possession; (3) that this right of possession, whatever its nature, was a statutory right, and its incidents were those prescribed by the act, and no other; (4) that while the act provided that the settler's right should "descend" to his heirs, the provision was not one for the descent of an acquired right, but was the grant of a new right. To quote: "Their title "to the land was to come, not from their deceased ances- "tor, but from the United States"; (5) that an act of the territory where the land was situated, providing that the settler's right should descend to his heirs as real estate, was nugatory, because Congress had otherwise provided.

In *Maynard v. Hill*, 125 U. S. Rep., 190, 215, *Hall v. Russell* was followed in the declaration that a settler under the Donation Act had but a mere possessory right, and acquired no vested interest until the completion of the period of residence required by the act. The case has been frequently followed as to that point by other courts, and also upon the point that where a settler upon the public lands dies prior to completing the necessary period of residence, those who succeed to his right acquire it not by descent from him, but as direct donees from the United States.

Cutting v. Cutting, 6 Fed. Rep., 259.
Stubblefield v. Manzies, 11 Fed Rep., 270.
United States v. Tichenor, 12 Fed Rep., 421.
Hershberger v. Blewett, 55 Fed. Rep., 177.
Cooper v. Wilder, 111 Cal., 195.

The appellant pins her faith to the doctrine of relation. She contends that when title to the lands "passed "out of the United States by patent, (it) instantly drop- "ped back in time to the inception or initiation of the "equitable right of William McCune," and became affected by the probate laws of the state.

The doctrine of relation is no more relevant to this case than is the doctrine of predestination. The Circuit Court of Appeals effectually disposed of that argument when it said: "Her husband (William McCune) had "nothing to which the doctrine of relation could apply." For:

"By the doctrine of relation is meant that principle "by which an act done at one time is considered by a "fiction of law to have been done at some antecedent "period. It is usually applied where several proceed- "ings are essential to complete a particular transaction, "such as a conveyance or deed. The last proceeding "which consummates the conveyance is held for certain "purposes to take effect by relation as of the day when "the first proceeding was had."

Gibson v. Chouteau, 13 Wall., 92, 101.

Evidently it is essential to the application of the doctrine of relation that there should have been an act which proceeded in unbroken sequence to the consummation of title. There can be no relation back from a completed title to an initial act when there is a break in the chain by which the two are connected; when the initiatory right relied upon has terminated, and the com-

pleted title is founded upon a wholly independent right, existing in a third person. In the case at bar, the title passed by patent to William McCune's widow could not relate back to the right which he acquired by settlement upon the lands, for that right died with him. He had nothing which he could transmit to her, and the title she obtained was based upon a right given her by the homestead act, as a qualified grantee in her own right, and did not rest upon any right which descended from him.

"As the law required full four years' residence by the "person who claimed the grant, if no provision had been "made for a continuance of his possession the land "would have become vacant on his death and open for "a new settlement by a new settler, if the law authoriz- "ing new settlements still remained in force. Hence it "was provided that the possessory rights of a deceased "settler should go to his heirs, and that they might get "the land on making the requisite proof, without further "residence and cultivation of their own. Their title to "the land was to come, not from their deceased ancestors, "but from the United States. * * * * It is enough "for this case that when their ancestor died he had "nothing in the land which he could transmit to them, "and that what they afterwards got came from the "United States and not from him. * * * We attach "no importance to the word 'descend' as used in this "section * * * * The thing done was to give the "heirs of a settler the benefit of his rights and to desig-

"nate them as the recipients of the bounty of the gov-
"ernment, instead of him."

Hall v. Russell, supra.

"Under these decisions, as well as others of this court,
"it is clear that the interest of Charles Cutting in this
"donation, whatever it was, terminated with his life, and
"that the land was not thereafter liable for his debts or
"subject to sale by his administrator, but thereupon be-
"came and was the absolute property of his wife and
"children, as the direct donees and grantees of the
"United States. In other words, they took by purchase
"and not descent. Fields v. Squires, 1 Deady, 382; Lamb
"v. Starr, Id. 451."

Cutting v. Cutting, 6 Fed. Rep., 259, 263.

"The heirs do not take the title by descent from their
"ancestor, but the land is conveyed to them directly
"from the United States by virtue of the privilege of
"purchase given to them expressly by the provisions
"of this section * * * The land is not subject to
"devise by the pre-emptor, nor can it be sold in satis-
"faction of his debts or for the expenses of administra-
"tion."

Wittenbrock v. Wheaton (Cal.), 60 Pac. Rep., 664.

In many cases, under many phases of the donation, homestead, pre-emption, and other public land grant acts, it has been held that the right of a settler is a personal one, that those designated by Congress to succeed to

the right take as original grantees and not through him, and that therefore the right is not amenable to the laws of the state where the land is situated when the settler dies.

Cases cited, *supra.*

Towner v. Rodegeb, 33 Wash., 153.
Rogers v. Clemans, 26 Kan., 552.
Dawson v. Mayall, 45 Minn., 408.
Cooper v. Wilder, 111 Cal., 195.
Gjerstadegen v. Van Duzen, 7 N. D., 612; 76 N.W. Rep., 233.
Chapman v. Price, 32 Kan., 446.

Another equally cogent argument against the application of the doctrine of relation in this case is that employed by the Circuit Court in its opinion. *McCune v. Essig*, 118 Fed. Rep., 273. It is that, as declared in *Gibson v. Chouteau*, the doctrine of relation "is a fiction "of law adopted by the courts solely for the purposes of "justice, and is only applied for the security and pro- "tection of persons who stand in some privity with the "party that initiated proceedings for the land, and ac- "quired the equitable claim or right to the title," and that the appellant is in no position to claim the benefit of the doctrine.

This is true, firstly, because appellant is not in privity with William McCune. By "privity" is meant, of course, privity of estate. Congress has conferred upon privies in blood of a deceased settler the right to take advantage of his right, but has denied to them, as the act is construed by the courts, any privity in estate, the

successors' title being in the nature of a direct and independent grant from the United States. Secondly, the purposes of justice would not be subserved by applying the doctrine. The patent vested the widow with a perfect record title, and it is not claimed that the appellees had notice of any defect in it, or took gratuitously. The Supreme Court of the State of Washington has held that where husband and wife settle upon public lands under the homestead act, and reside thereon for the full period required by the act, but the wife dies before final proof and issuance of patent, the full legal title passes to the husband, and children of the deceased wife cannot recover an one-half interest in the lands from purchasers for value and without notice from the husband.

Bolton v. Water Power Co., 10 Wash., 246.

The appellant does not make nearly so strong a case as the cited case, and it is certain that in neither does the sense of justice require the invoking of a fiction of law to invalidate a perfect record title, there being no circumstances of fraud or lack of consideration.

It may be suggested, moreover, that if a local rule of property is to be applied here, by virtue of which the decisions of the state court are controlling, as the appellant claims, the decision just cited concludes her from recovery.

The Circuit Court and the Circuit Court of Appeals held that *Hall v. Russell* was controlling in this case. We find it impossible, as well as deem it unnecessary, to follow appellant's counsel in his attempt to distinguish

that case. All that we can grasp of the argument is that it is inapplicable because the donation act astablished a rule of succession, which is not true of the homestead act. What difference this makes we are unable to discover, but the attempted distinction is rather absurd in view of the court's express declaration that the word "descend" was not intended to pass a property right by virtue of descent, but only to designate those whom the United States would accept as purchasers, or donees. In any event, there is no distinguishing of many other cases here cited, most of them following *Hall v. Russell*, and applying its doctrine under homestead, pre-emption, and other land grant acts. These citations make it clear that this court, as well as all other courts, has never considered that there was any difference in the policy, so far as the passing of title and right of succession is concerned, of any of the public land grant acts.

The rationale of the appellant's reliance upon the assertion that a local rule of property is involved, and that the decisions of the Washington state courts are controlling, is not apprehended. Certainly no case cited approaches the facts of this case. *Towner v. Rodegeb*, (33 Wash., 153) is the latest utterance of that court, and the principle of that case is applicable. Construing the homestead act, it follows the doctrine of *Hall v. Russell* and other like cases in the declaration that upon the death of a settler upon the public lands, "all his "rights under the homestead entry cease, and his heirs "become entitled to a patent, not because they have

"succeeded to his equitable interest, but because the "law gives them preference as new homesteaders, and "allows them the benefit of the residence of their ances- "tor upon the land." The acceptance of this principle is certainly fatal to the appellant's case.

It is not questioned, as we understand it, that if § 2291 determines who may take advantage of the possessory right of a deceased settler, the widow takes it to the exclusion of the heirs. In any event, it is too clear for discussion that it is only in the event of the death of the widow that the heirs take any right.

The decision of the Circuit Court herein will be found in 118 Fed. Rep., 273, and the Circuit Court of Appeals in 122 Fed. Rep., 588.

II.

On the Jurisdiction.

Jurisdiction of the Federal courts over this cause is asserted upon the ground that it is one "arising under the constitution or laws of the United States." A case may be said to so arise "whenever its correct decision depends upon the construction of either" (*Cohens v. Virginia*, 6 Wheat., 379), or when "the title or right "set up by the party may be defeated by one construc- "tion of the constitution or laws of the United States, "or sustained by the opposite construction." (*Osborn v. Bank of United States*, 9 Wheat., 822.)

Every fact relative to the acquirement of title, and essential to the sustaining of the appellant's or of the appellees' theory of the case, is set out in the amended

bill of complaint. These facts are repeated as showing the case to be one arising under the laws of the United States, and therefore removable, in the appellees' petition for removal. To sustain her cause the appellant relies upon the state statutes relating to the descent of property. To defeat it and maintain their title, the appellees rely upon § 2291 of the Revised Statutes. Their position may not be well taken, yet they have planted themselves upon a certain construction of that section, and if the court should hold that construction not warranted, they will be defeated thereby. It does not seem that a case could come more squarely within the words quoted from *Osboru v. Bank* above.

The appellant denies the jurisdiction of the Federal courts upon the baldly asserted ground that title has passed from the United States, and the only controversy is as to the beneficial interests in that title. This is begging the whole question. The appellant may assert that, but the appellees deny it, and the only manner in which it can be determined who is right is by construing a law of the United States.

Title to the lands in question was assuredly in the United States at the time of William McCune's death. His possessory right was not a vested right as against the United States, and Congress had the undoubted right to prescribe the incidents of that right. The appellant bases her claim upon the right of William McCune, and however much she may try to avoid it, reference must be made to § 2291, where Congress has prescribed the incidents of his right, to determine

whether the right was such that her claim is well taken. The appellees assert that William McCune's right ceased with his death, but that his widow, through whom they claim, was admitted as purchaser in his stead. The court is driven to determine, not what rights accrued five years after the death of William McCune, but what accrued at the time of his death. If his possessory right was property, title to which was amenable to the laws of the state, it would have descended then to his heirs, subject to administration proceedings for the payment of his debts. But the title could not have remained suspended. It must have vested instantly in some one, for an essential attribute of property is ownership somewhere. If it was not transmissible by him, it must have passed by operation of law, at the moment of his death, to some one else. Whichever way the balance inclines, it must be weighed by the Federal statutes.

Anderson v. Carkins, 135 U. S. Rep., 483, seems to be a ruling case on the jurisdictional question. The question there was whether a settler's homestead right was alienable. This court held that the incidents of that right were determinable only from a construction of the Federal statutes, and that it had jurisdiction to hear the cause and decide the question, even tho the state courts had based their decision upon state statutes. Surely if the question of the alienability of a settler's right depends upon the Federal law, without regard to the provisions of the state statute, the question of descendibility is likewise to be so determined.

Bernier v. Bernier, 147 U. S. Rep., 242, is another ruling case. The question of jurisdiction is not discussed, but jurisdiction of the cause on appeal from the highest court of a state was assumed, there being no other ground of jurisdiction than that the construction of a Federal law was involved. The suit was one by the adult heirs of a deceased settler to set aside a patent to the minor heirs alone, and the Federal question involved was whether all the heirs took equally, or whether the minor heirs took to the exclusion of the adults.

Hutchinson Investment Co. v. Caldwell, 152 U. S. Rep., 65, was another case where an appeal from a state court was entertained, the only jurisdictional ground appearing being the necessity for determining who are meant by the word "heirs" as used in § 2291.

The appellant's argument is based upon two fundamental errors. The first is that the only question to be determined here is as to who became beneficially interested in the title when it passed from the United States. But clearly that can only be determined by referring to the inception of the title upon the death of William McCune. The second is that no contention is made but that the patent went to the right person; the only claim is that in that fee simple title was hidden a beneficial interest to which appellant was entitled. To insist upon this would be to concede the appellee's case. They have a connected record title in fee simple from the United States. It can only be invalidated, in part as well as in the whole, by impeaching the patent, for the patent upon its face conveys every beneficial interest as well as

the legal title to the whole premises. The suit is as similar to *Bernier v. Bernier* in its object as two suits can be.

Respectfully submitted,

GEORGE TURNER,
Solicitor for Appellees.

F. H. GRAVES,
W. G. GRAVES,
of Counsel.

Supreme Court of the United States.

No. 61.—October Term, 1905.

Mary McCune, by Daniel Donahue, her Guardian ad litem, Appellant, vs. N. Fred Essig and Emma C. Essig, his Wife. } Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

[November 27, 1905.]

Mr. Justice McKenna delivered the opinion of the Court.

Suit in equity to establish title in appellant to an undivided one-half of northwest quarter of section 6, township 25 north, range 30 east, Washington meridian 2, and for accounting of rents and profits and for partition between appellant and appellees.

It was originally brought in the Superior Court in and for Lincoln County in the State of Washington. A demurrer was filed to the amended complaint and a petition to remove the suit to the Circuit Court for the District of Washington, Eastern Division, on the ground that the suit involved the construction of sections 2291 and 2292 of the Revised Statutes of the United States, and of all statutes of the United States relating to homesteads. The suit was removed. In the Circuit Court a motion was made to remand, which was denied, The demurrer was sustained, and appellant, electing to stand upon her bill, it was decreed that she had no right, title or interest in the land. (118 Fed. Rep. 273.) The decree was affirmed by the Circuit Court of Appeals. (118 Fed. Rep. 588.)

The facts as exhibited by the bill of complaint are that appellant is the daughter of William McCune, deceased, and his wife, Sarah McCune, now Sarah Donahue, and the stepdaughter of Daniel Donahue, who appears as her guardian *ad litem*. William McCune and his wife Sarah settled on the land in controversy, it being a part of the public domain and subject to settlement under the homestead laws. On the 4th of April, 1884, McCune filed a claim to the land as a homestead in the proper land district. In the same year he died intestate, leaving surviving as his only heirs appellant and his wife Sarah. They continued to reside on the land until December 17, 1889, upon which day the mother of appellant made the required proof of full compliance with the homestead laws, and on the 6th of March, 1891, a patent was issued to her. In the year 1892 she, having become Mrs. Donahue, sold and conveyed the land to appellees, who went into possession of it and have been in possession

of it ever since. The value of the land is sixty-four hundred dollars. The patent recites:

"Whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Spokane Falls, Washington, it appears that, pursuant to the act of Congress approved 20th May, 1862, 'to secure homesteads to actual settlers on the public domain,' and the acts supplemental thereto, the claim of Sarah Donahue, formerly the widow of William McCune, deceased, has been established and duly consummated, in conformity to law, for the south half of the northeast quarter and the lots numbered one and two of section six, in township twenty-five north of range thirty-eight of Willamette meridian in Washington, containing one hundred and sixty-three and eighty-four hundredths of an acre, according to the official plat of the survey of the said land, returned to the General Land Office by the surveyor general:

"Now know ye, that there is, therefore, granted by the United States unto the said Sarah Donahue the tract of land above described, to have and to hold the said tract of land, with the appurtenances thereof, unto the said Sarah Donahue and to her heirs and assigns forever."

The action of the lower courts on the motion to remand and on the merits are attacked by appellant to a certain extent on the same ground, to wit, that the laws of Washington determine the title of the parties, not the laws of the United States. The interest in McCune, acquired by his entry, it is contended, was community property, and passed to appellant under the laws of the State. Sections 4488, 4489, 4490 and 4491 of the Statutes of Washington provide that property and pecuniary rights owned by either husband or wife before marriage, or that acquired afterwards by gifts, bequests, devise or descent, shall be separate property. Property not so acquired or owned shall be community property, and, in the absence of testamentary disposition by a deceased husband or wife, shall descend equally to the legitimate issue of his or their bodies. (1 Ballinger Codes.) Relying on these provisions the argument of appellant is, and we give it in the words of her counsel:

"When William McCune entered this land he had not the legal title, but he had an immediate equitable interest and the exclusive right of possession until forfeited by failure to carry out the terms of his entry. (*United States* v. *Turner*, 54 Fed. Rep. 228.)

"The terms of his entry were carried out. The patent issued by reason of his entry. The State legislature had the right to direct to whom that equitable right and interest should pass. If the rights and interests under that entry had been forfeited, the State law would have no effect upon the title to the land. That equitable interest ripened, and was confirmed by the patent."

But this is begging the question. What interest arose in McCune by his entry, who could upon his death fulfil the conditions of settlement and proof, and to whom and for whom title would pass, depended upon the laws of the United States. (*Bernier* v. *Bernier*, 147 U. S. 242.) The motion

to remand was rightly overruled. On the merits we think the ruling of the lower courts was also right. (*Hutchinson Investment Co.* v. *Caldwell*, 152 U. S. 59.) *Hoadley* v. *San Francisco*, (94 U. S. 4,) and other cases relied on by appellant, are not in point.

Chapter five, Title XXXII, of the Revised Statutes provides who may enter public lands as a homestead and the conditions to be observed as to entry and settlement. By sections 2291 and 2292 it is provided as follows:

"SEC. 2291. No certificate, however, shall be given or patent issued therefor until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or, if he be dead, his widow; or, in case of her death, his heirs or devisees; or, in case of a widow making such entry, her heirs or devisees, in case of her death, proves by two credible witnesses that he, she or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land had been alienated except as provided in section twenty-two hundred and eighty-eight, that he, she or they will bear true allegiance to the Government of the United States; then, in such case, he, she or they, if at that time citizens of the United States, shall be entitled to a patent as in other cases provided by law.

"SEC. 2292 . . . In case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children."

It requires an exercise of ingenuity to establish uncertainty in these provisions. They say who shall enter and what he shall do to complete title to the right thus acquired. He may reside upon and cultivate the land, and by doing so is entitled to a patent. If he die his widow is given the right of residence and cultivation, and "shall be entitled to a patent as in other cases." He can make no devolution of the land against her. The statute which gives him a right gives her a right. She is as much a beneficiary of the statute as he. The words of the statute are clear, and express who in turn shall be its beneficiaries. The contention of appellant reverses the order of the statute and gives the children an interest paramount to that of the widow through the laws of the State.

The law of the State is not competent to do this. As was was observed by Circuit Judge Gilbert: "The law of the State of Washington governs the descent of land lying within the State, but the question here is whether there had been any descent of lands." And, against application of the State law, the learned judge cited *Willcox* v. *Connell*, (13 Pet. 517,) and *Bernier* v. *Bernier*, *supra*. In the former it was said that whenever the question is whether title to land which had been the property of the United States has passed, that question must be resolved by the laws of the United States, but that whenever, according to those laws, the title shall have passed, then, like all other property in the State, it is subject to State

legislation. In *Bernier* v. *Bernier* it was said that the object of sections 2291 and 2292 was "to provide the method of completing the homestead claim and obtaining a patent therefor, and not to establish a line of descent or rules of distribution of the deceased entryman's estate." See *Hall* v. *Russell*, (101 U. S. 503.) And hence it was decided that Mrs. Donahue took the title free from any interest or right in the appellant under the laws of the State.

Against the effect of the patent conveying title to Mrs. Donahue, appellant invokes the doctrine of relation. It is admitted "that the title to the real estate in the case at bar passed and vested according to the laws of the United States by patent." But, it is contended, that a beneficial interest having been created by the State law in McCune when the title passed out of the United States by the patent, it "instantly dropped back in time to the inception or initiation of the equitable right of William McCune, and that the laws of the State intercepted and prevented the widow from having a complete title without first complying with the probate laws of the State." This, however, is but another way of asserting the law of the State against the law of the United States, and imposing a limitation upon the title of the widow which section 2291 of the Revised Statutes does not impose. It may be that appellant's contention has support in some expressions in the State decisions. If, however, they may be construed as going to the extent contended for, we are unable to accept them as controlling.

Decree affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.